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In The

Supreme Court of the United States

October Term, 1991

SAM F. LONG and ELMER J. CANTRELL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Joint Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER LACK OF AUTHORIZATION ACCORDING TO A UNION'S CONSTITUTION AND BY-LAWS IS AN ESSENTIAL ELEMENT TO PROVE A VIOLATION OF 29 U.S.C. § 501(c), WHEN LACK OF AUTHORIZATION IS PLEAD AND CONTESTED.

II. WHETHER THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH A VIOLATION OF 29 U.S.C. § 501(c), WHEN THE DISTRICT COURT GRANTED THE PETITIONERS' MOTION FOR JUDGMENT OF ACQUITTAL, AFTER THE JURY RENDERED A VERDICT OF GUILTY, ON THE GROUNDS, *INTER ALIA*, THAT A PERSON ACTING IN ACCORDANCE WITH THE BUSINESS PRACTICES AND PROCEDURES FOR HIS UNION AND FULFILLING A MORAL AND/OR ETHICAL OBLIGATION COULD NOT BE GUILTY OF A VIOLATION OF 29 U.S.C. § 501(c).

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CITATIONS TO OFFICIAL REPORTS OF OPINIONS IN CASE

The Opinion of the United States Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, was decided and filed on December 12, 1991. The opinion is reported as *United States v. Long*, 952 F.2d 1520 (8th Cir. 1991), and set forth in the Appendix at App. 1 through App. 30. The Opinion of the United States District Court for the Western District of Missouri granting Petitioners' Motions for Judgment of Acquittal was decided and filed on December 5, 1990. The Opinion is reported as *United States v. Long*, 757 F. Supp. 1038 (W.D. Mo. 1990), and set forth in the Appendix at App. 31 through App. 49.

STATEMENT OF JURISDICTION

The appeal of *United States v. Long* was decided by a panel of the United States Court of Appeals for the Eighth Circuit on December 12, 1991. Timely petitions for rehearing were filed. Said petitions for rehearing were denied on February 21, 1992. The Supreme Court of the United States has jurisdiction to review this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES

29 U.S.C. § 501 Fiduciary Responsibility of Officers of Labor Organizations

(c) embezzlement of assets; penalty

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use

of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both. 29 U.S.C.A. § 501(c) (1988).

STATEMENT OF CASE

A. Procedural Statement of the Case

Respondent filed a ten-count indictment on June 14, 1990. The federal district court's jurisdiction was pursuant to 28 U.S.C. § 1331(a). The grand jury charged Defendants Cantrell and Long on all counts and Defendant Quick on counts One and Three through Seven.

Count One charged all three defendants with conspiring to obtain $10,000 from the International Union of Operating Engineers ("IUOE") for a Safety Program which was never implemented, in violation of 18 U.S.C. § 371. Count Two charged Long and Cantrell with conspiring to embezzle $10,000 from Local 101 to reimburse the IUOE's grant account, in violation of 18 U.S.C. § 371. Counts Three through Six charged all three defendants with receiving money unlawfully converted and taken by fraud from the IUOE, in violation of 18 U.S.C. §§ 2, 2314, 2315, and unlawfully transporting checks in interstate commerce in violation of 18 U.S.C. §§ 2 and 2314. Count Seven charged Cantrell with embezzling money from the Missouri State Building Construction and Trades Council ("Trades Council"), and Quick and Long in aiding and abetting Cantrell in committing said acts, in violation of

29 U.S.C. § 501(c) and 18 U.S.C. § 2. Count Eight charged Long with embezzling assets of Local 101, and Cantrell for aiding and abetting Long, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2. Count Nine charged Long with embezzling $10,000 from Local 101 and Cantrell with aiding and abetting Long, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2. Count Ten charged Cantrell with unlawfully transporting a $10,000 check, containing at least $5,000 of funds embezzled from the Trades Council, and Long for aiding and abetting Cantrell, in violation of 18 U.S.C. §§ 2 and 2314.

The trial by jury began on September 17, 1990. On September 27, 1990, the jury returned their verdict convicting Cantrell and Long on Counts Two, Nine and Ten. Cantrell and Long timely filed a Motion for Judgment of Acquittal, Arrest of Judgment, and New Trial on October 29, 1990. Upon consideration of their motion and the material filed by the parties, the district court granted the Motion for Judgment of Acquittal, ruling there was insufficient evidence to convict Cantrell and Long of Counts Two, Nine and Ten, on December 5, 1990.

Respondent timely filed its notice of appeal on December 14, 1990. The Eighth Circuit entered its opinion affirming the jury verdict on December 12, 1991. The Petitioners, separately and timely, filed Petitions for Rehearing which were denied on February 21, 1992.

B. Factual Statement of the Case

The Trades Council is, according to the indictment, a labor organization chartered by the AFL-CIO. It is comprised of representatives of various building and trade

unions and councils. Its office is in Jefferson City, Missouri. Its president, at all times relevant hereto, was Cantrell. Local 101 is a dues paying member of Trades Council.

IUOE is an international union comprised of member local unions. Its offices are in Washington, D.C. Local 101 is a member union of IUOE.

Local 101 is a labor union affiliated with the AFL-CIO. Its offices are in Kansas City, Missouri. Its president and business manager, at all times relevant hereto, was Long.

Cantrell set up the Missouri State Building and Trades Safety Program ("Safety Program"). Its administrator, at all times relevant hereto, was Cantrell.

Article XXIV of the constitution provides the laws, rules and procedures by which locals will conduct their affairs. Subdivision 1, section (a) of this article provides that a local may provide for a business manager in its bylaws. Local 101 so provided. This section of the constitution states that the business manager shall be the "chief executive officer" of the local. The constitution spells out the specific duties and responsibilities of each of the officers of a local union. However, Local 101 operated through custom and practice, not always in strict compliance with the constitution's provisions. Jim Foster, treasurer of Local 101, testified Local 101 did not strictly follow the constitution regarding the collection of receipts and disbursements of funds.

The constitution required the president and treasurer sign off on all checks written by the union. However,

because the president and treasurer were not always available when checks needed to be written, a signature stamp for each was developed and used as part of the custom and practice of the Local 101. Foster testified that checks were frequently written without his knowledge, because that was how Local 101 transacted business. Foster gave to the staff his authorization that his signature stamp could be used for check signing purposes. Vincent Angel, recording-corresponding secretary for the Local 101, testified that the use of the signature stamp procedure was done with the consent of the officers of Local 101.

At the end of each quarter, the treasurer is required to make an itemized statement and report to the Local Union. With respect to the $10,000 transaction in question, said transaction was not directly on the financial report made to the union monthly membership meeting. Foster testified that the full report is not read in its entirety, only summarized. Angel confirmed that the financial information presented to the membership was in summary fashion. Donald Shaw, financial secretary, confirmed that the custom and practice of Local 101 was to provide the membership with a summary of the financial transactions.

Although the $10,000 transaction in issue was not directly itemized on the financial report read to the membership, there were many financial documents of Local 101 evidencing the transaction: a deposit slip showed the receipt of the $10,000 from Jorgensen; the financial books and records of the union were open to the Executive Board and were never concealed from the membership; the cash receipts journal showed the deposit of the

$10,000 from Jorgensen; the cash register; the cash disbursement and cash deposit journals (2 vols.) (contain July, 1987); the bank statement for July, 1987 showed the $10,000 deposited as a reimbursable expense; the financial statement for July, 1987, and attached to the statement was the cash receipts journal evidencing the recording of the $10,000 transaction; and the general ledger for July, 1987.

Albert Hill, the director of the Department of Safety and Health for IUOE, learned from the general president of IUOE, J.C. Turner, that Long had approached Mr. Turner requesting financial assistance in promoting safety and health programs in Missouri. Upon speaking to Long, Hill learned that Long was interested in implementing a cooperative labor-management safety program and wanted some seed money to get it started. After further discussions and a determination by IUOE that OSHA was not going to fund the proposal, Hill told Long that IUOE would provide seed money for a Missouri state program. IUOE sent Long two checks for $5,000 because Local 101 was a member of IUOE and Hill had a working relationship with Long, which he did not have with the Trades Council. The two checks were written to the Safety Program.

At some point after the checks had been sent to the Safety Program, Hill received notice from OSHA that it was disallowing the grant to the Safety Program because IUOE had not included the $10,000 expenditure on the previous year's budget. After trying to get OSHA to reverse their decision, Hill finally called Long and told

him the money had to be returned because OSHA disallowed the expenditure. Because of his working relationship with Local 101, Hill called Long seeking his assistance to try and get the money back. Long agreed to help.

Long contacted Cantrell to inform him that the money for the safety program had to be returned. Cantrell informed Long that the money had been expended and the Trades Council could not pay the money back because it was not the Trades Council's program. Long told Cantrell because Local 101 instigated getting the program started, he and Local 101 felt an obligation to reimburse IUOE.

Cantrell had no idea how Long was going to get the $10,000 to reimburse IUOE. The only contact Cantrell had was when Long called and said he was going to make the reimbursement. Long then told Cantrell that the check would come from Local 101 to the Safety Program and then it should be forwarded on to IUOE.

Safety for operators was a concern to Long and a topic of frequent discussion by Long. Long attended conferences and gave workshops and demonstrations at conferences on safety. At one of those conferences, in 1987, Long met Ernest Jorgensen. Mr. Jorgensen owns his own company, Professional Safety Consultants Company. At the conference when he met Long, Jorgensen told Long that he was working on a project for the operating engineers, developing training programs on cranes, derricks, and other things. Jorgensen had heard Long developed some models and asked if said materials could be made available to him. Long told Jorgensen that he would be

willing to sell Jorgensen the materials and Jorgensen agreed. Jorgensen decided to purchase the materials because then the materials would belong to him. For $6,200, Jorgensen purchased a model derrick and some materials accumulated for presentations in court and to OSHA. For an additional $3,800, Jorgensen purchased photographs, displays, research data, and other technical information. Said materials were never listed on the books of Local 101 as assets and had been expensed at time of purchase.

Upon receipt of the $10,000 from Jorgensen, Long gave the $10,000 to Marie Plummer, Local 101's bookkeeper, and asked her to issue a check to the Safety Program for $10,000. Not sure how to record the transaction, Plummer made a note to ask the auditor (Mr. Eib) how to handle the transaction. Eib directed Plummer on how to post the transaction, the receipt of the money from Jorgensen and the issuance of the check to the Safety Program.

Upon receipt of the $10,000 check from Local 101, written to the Safety Program, Cantrell deposited the money into a Trades Council account. Sanford, secretary and bookkeeper for Trades Council, contacted Trades Council's accountant, Elmer Evers, about how to record the transaction on the financial books and records of Trades Council. Evers instructed Sanford to deposit the money, write out the check, and show where it went and who it was received from. It was properly recorded on the books and records of Trades Council. A check was then issued to IUOE. Cantrell and his secretary had authority to sign the check. The matter was presented to the Executive Board of the Trades Council, in the regular

course of business, and approved by them and reflected in the minutes.

REASONS FOR GRANTING THE WRIT

I. WHETHER LACK OF AUTHORIZATION ACCORDING TO A UNION'S CONSTITUTION AND BY-LAWS IS AN ESSENTIAL ELEMENT TO PROVE A VIOLATION OF 29 U.S.C. § 501(c), WHEN LACK OF AUTHORIZATION IS PLEAD AND CONTESTED.

Granting of a petition for writ of certiorari is proper, *inter alia,* when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. In this case, Petitioners assert a conflict exists between the circuit courts of appeals, and between the Eighth Circuit and the district court that tried this case, on the issue of whether lack of authorization according to a union's constitution and by-laws is an essential element to prove a violation of 29 U.S.C. § 501(c), when lack of authorization is plead and contested.

29 U.S.C. § 501 governs the fiduciary responsibility of officers of labor organizations. 29 U.S.C. § 501(c) governs embezzlement of assets and penalties. Subsection c provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the monies, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or

> indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Petition for Writ of Certiorari is sought for this Court to determine whether § 501(c) requires the government to prove beyond a reasonable doubt that the actions of an officer, or employee of the union, were unauthorized according to a union's constitution and bylaws.

Since the mid-1970's, the circuit courts of appeals have debated what elements of proof constitute a violation of § 501(c). In 1974, the Eighth Circuit held that § 501(c) required union officials to (1) possess fraudulent intent, and (2) act without authorization according to union constitution and bylaws. *United States v. Goad,* 490 F.2d 1158, 1166 (8th Cir.), *cert. denied,* 417 U.S. 945 (1974). The First Circuit followed in *United States v. Sullivan,* 498 F.2d 146, 150-52 (1st Cir.), *cert. denied,* 419 U.S. 993 (1974), concluding no violation of § 501(c) occurs if there exists actual authorization according to the union's constitution or a good faith belief that the acts were authorized (i.e., lack of fraudulent intent). Other circuits have also followed *Goad,* holding that the government must prove lack of authorization and fraudulent intent. *United States v. Busacca,* 863 F.2d 433, 436 (6th Cir. 1988); *United States v. Stockton,* 788 F.2d 210, 217 (4th Cir. 1986); *United States v. Dixon,* 609 F.2d 827, 829 (5th Cir. 1980).

In 1984, the Eighth Circuit examined the essential elements issue of a § 501(c) violation again. *See United States v. Welch,* 728 F.2d 1113 (8th Cir. 1984). Recognizing its holding in *Goad* that both fraudulent intent and lack of authorization were the elements of the offense, the *Welch*

court stated that in *Goad* it expressly reserved the question whether a § 501(c) offense exists when there is fraudulent intent and proper authorization but lack of union benefit. *Welch*, 728 F.2d at 1117 (quoting from *Goad*, 490 F.2d at 1166). The court in *Welch* focused on this issue left open in *Goad* and concluded that when the union has authorized a union official's actions, he or she is not insulated from the reach of § 501(c), rather the offense hinges on whether fraudulent intent exists.[1] *Id.*

Two circuits have reached the conclusion that lack of authorization is not an essential element of a § 501(c) violation. *United States v. Floyd*, 882 F.2d 235, 240 (7th Cir. 1989); *United States v. Thordarson*, 646 F.2d 1323, 1334-35 (9th Cir. 1981). In *Floyd*, the Seventh Circuit followed the rationale of *Welch*, while apparently not realizing that in *Welch*, the government conceded the authorization element. 882 F.2d at 239-41. In *Thordarson*, the Ninth Circuit held lack of authorization not an element and need not be plead in a § 501(c) prosecution, because lack of authorization did not have a counter-part in common law theft crimes or other federal theft statutes. 646 F.2d at 1334-35. *But see United States v. Stockton*, 788 F.2d 210, 217 (4th Cir. 1986) (§ 501(c) encompasses the traditional concept of embezzlement which requires a conversion – or, an unauthorized appropriation – of another's property).

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[1] Interestingly, in *Welch*, the government conceded that the union authorized the defendants' actions. 728 F.2d at 1117. However, in the cause before this court, the Indictment alleged Long's acts were unauthorized and the government vehemently contested the issue of authorization (or lack thereof) throughout the trial and on appeal.

In the cause before this court, the Indictment alleged Long's acts were unauthorized because done without knowledge and approval of the executive board (App. 60)[2]; the government did not concede Long's acts were authorized; and Long presented evidence that his actions were authorized according to the union's constitution and bylaws, as required by *Goad*, yet the district court held lack of authorization not an element of the offense. (App. 39, 47). Part of Long's evidence was testimony of an expert witness, the district court refused to allow this evidence of authorization to go to the jury. Relying on *Welch*, the district court held that evidence of authorization (or lack thereof) bore on the issue of whether fraudulent intent was proved beyond a reasonable doubt. (App. 40). This holding was reached even though the issue of whether Long's acts were authorized remained a hotly contested issue throughout the case.

While concluding lack of authorization was not an element, the district court subsequently, but improperly, instructed the jury that lack of authorization was an element of the offense, without indicating to the jury what facts it must find beyond a reasonable doubt to constitute a lack of authorization. (App. 39). As stated

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[2] The district court did hold that the government's theory on lack of authorization was not properly plead. The Indictment alleged that Long was required to obtain the approval of the union's executive board. However, the trial court refused to allow the government to put on such evidence because the union's constitution and bylaws did not require approval by the executive board for Long's actions.

above, the district court's reliance on *Welch* was misplaced and the Eighth Circuit erred in not correcting the error.

In *Long*, the Eighth Circuit recognized that *Goad* properly set forth the essential elements of a § 501(c) violation and, that the district court declined to follow *Goad* when it concluded lack of authorization was not an element of the offense. (App. 7). Long asserts that, while the Eighth Circuit recognized the district court's error in concluding that lack of authorization according to the union's constitution and bylaws was not an essential element of a § 501(c) violation, the Eighth Circuit ignored the error. The appellate court ignored the error by stating the district court considered authorization as a factor on the issue of fraudulent intent. Long asserts that both the district court's and the Eighth Circuit's failure to follow the holding in *Goad*, when the issue of lack of authorization was not conceded by the government, effectively eliminated an essential element of proof for the government in its § 501(c) prosecution of Long.

In this Petition for Writ of Certiorari, Petitioners respectfully request this Court determine whether lack of authorization according to union constitution and bylaws is an essential element to convict a person of a violation of 29 U.S.C. § 501(c), when lack of authorization is plead and contested. Contrary to the facts in *Welch*, the Indictment in this case alleged lack of authorization and the government did not concede that the union had authorized Long's actions. The issue of authorization should have gone to the jury after Long was able to present all of his evidence supporting authorization, including excluded expert testimony, to the jury. Counts Two and

Nine of the Indictment directly presented the authorization issue. (App. 58-62, 65-66). Count Ten alleged a violation of 18 U.S.C. § 2314 (App. 66), but the jury, to find Long and Cantrell were involved in the interstate transportation of stolen money, had to find that the stolen money was from Local 101 and was stolen because Long had no authorization from the union to send the money to the Safety Program via the Trades Council and then to the IUOE.

Even if this court concludes that lack of authorization is not an essential element of a § 501(c) violation, Petitioners assert that because the Indictment alleged lack of authorization, lack of authorization became an essential element. *See United States v. Marolda*, 615 F.2d 867, 870-71 (9th Cir. 1980) (where the indictment alleges "without proper authorization and without benefit to said local", the government must prove such, or a variance occurs). Here, the district court did not require the government's proof to meet the allegations in the Indictment and therefore, a new trial should be granted.

II. WHETHER THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH A VIOLATION OF 29 U.S.C. § 501(c), WHEN THE DISTRICT COURT GRANTED THE PETITIONERS' MOTION FOR JUDGMENT OF ACQUITTAL, AFTER THE JURY RENDERED A VERDICT OF GUILTY, ON THE GROUNDS, *INTER ALIA*, THAT A PERSON ACTING IN ACCORDANCE WITH THE BUSINESS PRACTICES AND PROCEDURES FOR HIS UNION AND FULFILLING A MORAL AND/OR ETHICAL OBLIGATION COULD NOT BE GUILTY OF A VIOLATION OF 29 U.S.C. § 501(c).

Because the court of appeals in this case has decided an important question of federal law which has not been,

but should be, settled by this Court, certiorari should be granted to resolve the issue of whether there was sufficient evidence to establish a violation of 29 U.S.C. § 501(c), when a person acted in accordance with the business practices and procedures for his union and fulfilled a moral and/or ethical obligation. The final resolution of this case will not only affect these Petitioners and how business in their respective unions will be conducted, but it will also have a significant impact on each and every union organized within the United States of America.

A. LACK OF FRAUDULENT INTENT

Section 501(c) does not hold union officers strictly liable for misuse of union funds. *Welch*, 728 F.2d at 1116. This section only holds union officers criminally liable when they embezzle, steal, or *unlawfully* and *willfully* abstract or convert to their own use, or the use of others, the funds of the union. *Id.* Willfulness is proved under § 501(c) by showing the defendant "was sufficiently aware of the facts to know that he was acting wrongfully and in contravention of the trust placed in him by the union and its members." *Id.* (quoting *United States v. Belt*, 574 F.2d 1234, 1238 (5th Cir. 1978)).

The Eighth Circuit in *United States v. Goad*, defined willfulness or criminal intent as an act committed by defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident, or in good faith. 490 F.2d

1158, 1166 n.10 (quoting *United States v. Rabb*, 394 F.2d 230, 232 (3d Cir. 1968)).

In the courts below, all of Respondent's arguments, hinged on or related to the sole fact that Long did not disclose the particulars of the $10,000 transaction to the other officers or membership of Local 101. Respondent argued Long's actions were not authorized because he failed to disclose the particulars of the transaction. Because the issue on appeal was whether the Respondent proved fraudulent intent beyond a reasonable doubt, the focus was on whether Long's alleged failure to disclose proved fraudulent intent beyond a reasonable doubt, in light of all the surrounding circumstances. *Welch*, 728 F.2d at 1119 (quoting *Morissette v. United States*, 342 U.S. 246, 275-76 (1951)).

1. Long followed the customs and practices of Local 101.

Custom and practice "results from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent." Black's Law Dictionary 347, 1055 (5th Ed. 1979).

Over the years, Local 101 developed a custom and practice (a procedure) for the receipt and disbursement of funds, recording of transactions and reporting of information to the Executive Board and the membership. Money received by Local 101 was taken in by the office staff personnel, generally Ms. Plummer, the bookkeeper. Ms. Plummer recorded receipt of said monies in the proper journals. Any questions that Ms. Plummer had

regarding how a particular transaction should be recorded, she was to contact the auditor, Mr. Eib. All transactions were recorded according to generally accepted accounting principles. Local 101 relied on the auditor, Mr. Eib, for proper accounting of their financial reports and records. Entries made to the proper journals and the general ledger were then input into a computer. The computer, located at Local 101's offices, generated the monthly report reviewed by the Executive Board. This computer generated report is a summary of all of the financial transactions of Local 101 for a particular month. The report did not review every single transaction for each month. At membership meetings, Local 101 did not discuss all of the financial details with the membership. Each transaction was not discussed, either at Executive Board meetings or at membership meetings, because that would have been an impossibility, as in some months receipts and expenditures exceeded $200,000. Regarding the issuance of checks, the president and treasurer were required to sign off on the checks. Signature stamps for both the president and the treasurer were available for use should the president or treasurer, or both, not be available at the time a check needed to be issued. This custom and practice was done with the consent of the officers. The financial secretary never signed a check voucher prior to the issuance of a check.

Respondent argued that because Long failed to follow his precise duties, as specified by the constitution and bylaws, Long violated § 501(c). As the district court pointed out, the $10,000 transaction may not have followed the precise duties and language of the constitution

and bylaws of Local 101. (App. 41). However, the evidence showed that the means of accomplishing this transaction, and the means of recording it on Local 101 records, were actually the same means used for all Local 101 financial transactions. (App. 41). All of the evidence at trial supported the district court's finding.

Large unions, of which Local 101 is one, receive and disburse money on a daily basis. Such transactions are recorded in the appropriate financial journals, deposits made and checks issued. Literally hundreds of individual transactions are recorded in a thirty-day period. Financial reports are generated on a monthly and/or quarterly basis. As Shaw testified, there were some months that receipts and disbursements for Local 101 exceeded $200,000. Both Angel and Shaw testified that it was not the practice of Local 101 to discuss all the financial details for each month, and such a practice would have been impossible. Additionally, Foster identified a check, dated June 25, 1987, for $18,728.40 that was not reflected on the monthly report presented to the Executive Board and read to the membership. Foster's signature was stamped on this check too.

Respondent contended on appeal that the district court suggested that the custom and practice which developed within Local 101 obviated the need for authorization and that "there is no evidence to that effect." Respondent is incorrect. The district court refused to discuss the issue of whether Long's actions were authorized. It focused on whether all the evidence of custom and practice manifested a complete lack of fraudulent intent. Defendants agree with the district court, because custom and practice evidence goes to show Long's good

faith belief that his actions were authorized, thereby nullifying any fraudulent intent.[3]

The Eighth Circuit acknowledged that there was "substantial evidence that Long complied with the custom and practice of Local 101." (App. 15). Petitioners respectfully suggest that because there is "substantial evidence" manifesting lack of fraudulent intent as the Eighth Circuit suggested, there cannot be a sufficient amount of "substantial evidence" to support the jury's verdict as required by *United States v. Schubel*, 912 F.2d 952, 955 (8th Cir. 1990).

The Eighth Circuit has recognized that relying on custom and practice may effectively authorize a person's actions. *See United States v. Dickens*, 879 F.2d 410, 412 (8th Cir. 1989) (valid to rely "on evidence of custom and practice of trial attorneys and judges to refute allegations of procedural infirmities"); *Otey v. Grammer*, 859 F.2d 575, 580 (8th Cir. 1980) (relying on customary practice in state district court, trial "counsel cannot be found to have been unreasonable, and thus ineffective, for conforming to it"). *See also Bouchillon v. Estelle*, 628 F.2d 926, 928 fn.5 (5th Cir. 1980) ("[e]vidence as to standard practice or customary practice can be used to demonstrate compliance with constitutional standards in a hearing on a petition for habeas corpus").

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[3] Petitioners assert that custom and practice evidence also manifests that Long's actions were authorized. Therefore, such evidence offers proof of both elements of a § 501(c) offense.

Notwithstanding Local 101's custom and practice regarding the handling and recording of financial transactions, Respondent wishes to hold Long responsible for his duties as president and business manager, as specified in the constitution and bylaws. However, with respect to the handling and recording of financial transactions, Long had no duties. It is the duty of the financial secretary to receive all monies and all funds paid to Local 101 and to pay said funds to the treasurer. It is the duty of the treasurer to hold all funds collected by the financial secretary and to make an itemized statement to report to the membership. It is the duty of the auditors to audit books and accounts of the recording-corresponding secretary, financial secretary, and treasurer each quarter and report on the audit at the first meeting in January, April, July and October.

2. Local 101's Obligation to Reimburse.

The district court concluded that Local 101 had at least a moral or ethical obligation to reimburse IUOE for the money it provided to the Safety Program. (App. 42). Petitioners agree. Respondent has suggested there are no documents, nor testimony that support a finding that Local 101 had an interest in reimbursing the IUOE. Petitioners disagree.

Local 101 is a member union of IUOE. Mr. Hill testified that he considered Local 101 to be an integral part of the IUOE. Hill stated that Local 101 was very interested in safety. Long, president of Local 101, instigated a request to IUOE for financial assistance to start a safety program. IUOE sent Local 101 the two checks totaling

$10,000 as seed money for the Safety Program because Hill had a working relationship with Long, which he did not have with the Trades Council. For a number of years, IUOE had received tremendous support from Local 101 in all of its safety programs throughout the country.

Article I, Section 2, of the constitution governing both IUOE and Local 101, states that the objects and purposes of the organization are, *inter alia*: to cultivate feelings of friendship among the men of the craft; to promote the health, welfare and safety of its members; and to promote programs to advance the skills, efficiency and working knowledge of the members. As president of Local 101, Long had a duty to enforce the constitution.

At some point after the checks had been sent for the Safety Program, Hill received notice from OSHA that it was disallowing the grant to the Safety Program because IUOE had not included the $10,000 expenditure on the previous year's budget. After trying to get OSHA to reverse their decision, Hill finally called Long and told him the money had to be returned because OSHA disallowed the expenditure. Because of his working relationship with Local 101, Hill called Long seeking his assistance to try and get the money back. Long agreed to help.

Long contacted Cantrell to inform him that the money for the Safety Program had to be returned. Cantrell informed Long that the money had been expended and the Trades Council could not pay the money back because it was not Trades Council's program. Long told Cantrell he felt an obligation on himself and Local 101 to

repay the money because Local 101 instigated getting the money for the Safety Program.

On May 28, 1987, Long wrote Hill a letter. The letter expressed his appreciation to Hill for Hill's "initial assistance when we were trying to put together our safety program", and Local 101's desire to pursue safety programs for its members and disappointment that OSHA was requiring the money to be returned.

Long closed with the following post-script: "P.S. I hope this $10,000 reimbursement will alleviate any hardships you have encountered." Clearly, Long hoped the reimbursement could fulfill Local 101's obligation to reimburse and, as president, his constitutional obligation of promoting and enforcing the objects and purposes of the constitution.

Respondent points out that Local 101 had no legal obligation to make the reimbursement and that is true. Additionally, as the district court pointed out, no organization had a legal obligation except for IUOE because it gave the seed money without including it on their budget, contrary to OSHA requirements. (App. 42). As discussed above, there was plenty of evidence presented at trial establishing a moral or ethical obligation on the part of Local 101 to reimburse IUOE. Clearly, Local 101 had an interest in the reputation and well-being of IUOE and Trades Council (App. 42), as well as its own, and a constitutional obligation to fulfill.

B. LONG'S ACTS WERE AUTHORIZED

The indictment alleges that Long sold assets of Local 101 and caused a check to be issued from Local 101 without the pre-authorization of the Executive Board. The

district court properly disallowed Respondent from offering evidence of whether or not the Executive Board preauthorized Long's actions because there is no provision within the IUOE constitution or the Local 101 bylaws creating such a requirement on Long, or any other officer. Petitioners also assert that lack of authorization was not properly pled.

Proof of lack of authorization according to the union's constitution and bylaws is an essential element under a § 501(c) prosecution. *Goad,* 490 F.2d at 1166. Respondent argued below that Long's actions regarding the transaction were not authorized because he did not disclose the details of the transaction to the officers or the membership. Petitioners disagree. As discussed above, all of Long's actions were pursuant to the custom and practice (normal procedures) of Local 101, and therefore authorized.[4] *See United States v. Hart,* 417 F. Supp. 1314 (S.D. Ia. 1976).

On pp. 14 and 15 of its opinion, the Eighth Circuit stated that Petitioners cited *Hart* for the position that Long's actions were authorized and, therefore, he acted without fraudulent intent. (App. 14-15). Petitioners respectfully disagree and state that *Hart* was cited in that portion of Petitioners' brief on appeal arguing that Long's actions were authorized according to the union's constitution and bylaws. The Eighth Circuit correctly stated that, in *Hart,* the court did find that the evidence was insufficient to establish fraudulent intent. (App. 17).

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[4] Pursuant to an offer of proof, Louie Wright testified that pursuant to the language and history of the constitution and bylaws and the custom and practice used by Local 101, Long's actions were authorized. The trial court requested this offer of proof.

However, almost 90 percent (8 of 9 pages) of the opinion addressed the other essential element of a 501(c) offense, lack of authorization according to the union's constitution and bylaws. In *Hart*, the court also found that the evidence established that the acts performed by the defendant in question, were authorized. 417 F. Supp. at 1322. This finding is somewhat contrary to the Eighth Circuit's conclusion that the court in *Hart* acquitted Hart because the government failed to prove fraudulent intent.

Long suggests that, while the court in *Hart* found insufficient evidence of fraudulent intent, its judgment of acquittal was substantially based on the determination that the evidence established that the acts of the defendant in question were authorized. In great detail, the court in *Hart* discussed, *inter alia*, the union's constitution and bylaws; the recording of the transactions at issue; the financial reports and how they were being compiled and approved; and the fact that the books and records were available to the executive board members of the union. In *Hart*, the court concluded that the union had ratified the acts of the defendant. 417 F. Supp. at 1318.

Long agrees with the conclusion by the court in *Hart*, that the union effectively ratified his acts and that the government's arguments were without merit. Those arguments are effectively identical to those raised by the Government in this case: (1) specific prior authorization was not given by the executive board; (2) the records of the payments were "buried" among legitimate expenditures and the union's books; and (3) the type of expenditures was outside of any proper authorization that might have been given. *See Hart*, 417 F. Supp. at 319.

Similarly, the Eighth Circuit has held that "the authority of a corporate officer 'may be inferred from the general manner in which for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs' of his principal." *Federal Savings & Loan Insurance Corp. v. First National Bank,* 164 F.2d 929, 933-34 (8th Cir. 1947) (quoting *Martin v. Webb,* 110 U.S. 7 (1884)). The facts presented at the trial of this cause support a finding that Long's acts, the business manager and president of Local 101, were authorized by the union's constitution and bylaws. Long was empowered by the union to run its business affairs. Petitioners suggest that under the law of the Eighth Circuit as established in *Federal Savings Loan Insurance Corp., Dickens, Otey,* and *Bouchillon,* and further supported by *Hart,* Long's acts were authorized and, therefore, the government failed to prove an essential element of a § 501(c) offense.

C. AIDING AND ABETTING AND COUNT TEN

To be guilty of aiding and abetting under Count Nine, Cantrell must share in the principal's criminal intent. *United States v. Lard,* 734 F.2d 1290, 1298 (8th Cir. 1984). Therefore, Cantrell cannot be guilty under Count Nine because Long had no fraudulent intent. Cantrell knew nothing about how Long was going to attempt to acquire the funds to reimburse IUOE. The district court properly found:

> [t]here was no evidence that Defendant Cantrell knew the means by which Defendant Long would obtain the funds. To be found guilty of

> aiding and abetting, a defendant must "in some sort associate himself with the venture, that he participate in it as something he wishes to bring about, that he seek by his actions to make is succeed." *Lard*, F.2d at 1298 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619, 695 S.Ct. 766, 770 (1949).

(App. 43). Cantrell not only knew nothing about the *means* of how the money would be reimbursed, he also did not participate in the alleged embezzlement from Local 101.

Count Ten charged Cantrell with causing the check from the Trades Council to IUOE to be transported in interstate commerce, knowing said check to be embezzled, stolen, converted, or taken by fraud and Long with aiding and abetting. There is no evidence to support the jury's verdict.

Local 101 sent Cantrell, administrator of the Safety Program, a check for $10,000. The payee on the check was the Safety Program. Prior to issuing the check, the seed money for the Safety Program had been expended and the Safety Program checking account closed. Cantrell received and deposited the check into the account of the Trades Council and upon advice of an accountant, issued a check to the IUOE. It was the Safety Program's money and, as the district court pointed out, "had the [Trades Council] done anything but reimburse the IUOE with these funds, the [Trades Council] itself would have been stealing, converting, or taking by fraud those funds." (App. 44).

It was incumbent upon the government, for a violation of 18 U.S.C. § 2314, to prove that the Petitioners

knew that the $10,000 check that went from the Trades Council to IUOE was stolen, converted, and taken by fraud. It is almost impossible to know for sure what the government contends constituted proof that the Petitioners violated the law in this regard. Presumably, it would appear that the government contended that Long knew that he had committed a violation of law as set out in Count Nine. There was no such evidence sufficient to show that Long was in fact guilty of a violation of law and/or that Cantrell knew of such violation of law. The evidence showed Cantrell had no idea how Long was going to get the $10,000 to reimburse IUOE. *United States v. Miller,* 725 F.2d 462 (8th Cir. 1984) (knowledge that the property was stolen or taken by fraud is an essential element of the offense).

Certainly, from the actions of Cantrell, with respect to this check and the Trades Council, there can be no showing that Cantrell's actions violated the law. Cantrell put the money into a Trades Council account. Sanford, secretary and bookkeeper for Trades Council, contacted the accountant, Elmer Evers, about how to record the transaction. Evers instructed Sanford to deposit the money, write out the check and show where it went and who it was received from. Cantrell and his secretary had authority to sign the check to send on to IUOE/OSHA. The matter was presented to the Executive Board of the Trades Council, in the regular course of business, and approved by them and properly reflected in the minutes. Again, there is simply no evidence that there was any violation of law or that the Petitioners had the intent to violate the law. Also, there is no evidence that Long knew of any of the actions of Cantrell relating to the Trades Council's bylaws

and constitution. *See United States v. Roby,* 499 F.2d 151 (10th Cir. 1974); *United States v. Stack,* 853 F.2d 436 (6th Cir. 1988) (conviction reversed based on failure to instruct jury that defendant had knowledge that money was taken by fraud); *Miller, supra.*

D. NO CONSPIRATORIAL AGREEMENT

"The essence of a conspiracy is an agreement between two or more persons to commit an illegal act." *United States v. Peyro,* 786 F.2d 826 (8th Cir. 1986). As the district court pointed out, there is no evidence that Long and Cantrell agreed to commit an illegal act. (App. 45).

Hill contacted Long to tell him that OSHA disallowed the expenditure of the seed money to the Safety Program. Hill called Long because he wanted Long's assistance in getting the money back and Long agreed. Long called Cantrell and told him that the money received from IUOE for the Safety Program needed to be returned. Long said he felt Local 101 should make restitution because it instigated the Safety Program. Long told Cantrell that Local 101 would send the money to the Safety Program and asked that it then be forwarded on to IUOE. This was the only evidence adduced at trial regarding any conversation between Cantrell and Long about paying IUOE back. Cantrell had no idea how Long was going to get the $10,000 to reimburse IUOE. There is no evidence of any conversations between Cantrell and Long indicating they jointly had any design, purpose, or intent to steal or convert money of Local 101. *See Cartello v. United States,* 93 F.2d 412 (8th Cir. 1937).

In *Cartello*, the defendants, four election officers and one party worker, were convicted of causing a false count, record and return to be made and certified to the Board of Election Commissioners by changing ballots to indicate votes as straight party tickets. 93 F.2d at 413. First, the Eighth Circuit determined the offense to be an unlawful conspiracy. *Id.* Focusing then on whether the defendants entered into an unlawful agreement, the court found "no evidence of any conversations between any of the defendants with reference to the conduct of the election, indicating that the defendants jointly had any design, purpose, or intent to miscount, alter, or make false return of the votes cast." *Id.* After reviewing the circumstances, the court stated that proof sufficient to connect one of the defendants with the erasures and alterations on the ballots, was insufficient to convict all the defendants. *Id.* at 415. As the district court found in the case,

> [a]ssuming *arguendo* that the *means* by which Defendant Long intended to obtain these funds were illegal, there is no evidence from which it can be inferred that Defendant Cantrell agreed to or even knew of the means Defendant Long would use.

(App. 45) (emphasis provided by court). Cantrell had no idea how (the means) Long was going to obtain the funds to reimburse IUOE. The conspiracy itself is the corpus delicti charged and it was essential for Respondent to establish the existence of an agreement to commit an illegal act. *Cartello*, 93 F.2d at 415.

As stated above, Petitioners' contentions regarding Counts Two and Nine, also relate to Count Ten.

CONCLUSION

What constitutes the essential elements of a 29 U.S.C. § 501(c) violation when lack of authorization according to a union's constitution and bylaws is a disputed issue is subject to contrasting rulings. The United States courts of appeals' decisions are in conflict. It is necessary for this Court to resolve the conflict. It is also important for this Court to review the Petitioners' second contention because no person should be convicted of a violation of 29 U.S.C. § 501(c) when he acted in accordance with the business practices and procedures for his union and fulfilled a moral and/or ethical obligation.

WHEREFORE, for the foregoing reasons, Petitioners respectfully request this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-3063

United States of America, Appellant, v. Sam F. Long, Appellee.	* * *

The United States appeals from an order acquitting Sam F. Long and Elmer J. Cantrell of conspiring to embezzle money from a union in violation of 18 U.S.C. § 371 (1988), of embezzling money from a union in violation of 29 U.S.C. § 501(c) (1988) and 18 U.S.C. § 2 (1988), and of unlawfully transporting stolen money in violation of 18 U.S.C. § 2314 (1988). A jury convicted Long and Cantrell on these three counts, and the district court ordered acquittals on the grounds of insufficient evidence. The jury also acquitted Long, Cantrell, and Edward E. Quick on seven other charges. On appeal, the government argues that the district court erred by considering only the evidence relating to the counts on which the jury convicted Long and Cantrell, and that sufficient evidence existed to support the convictions on all three counts. The government also argues that the district court erred by conditionally ordering a new trial to determine whether there was one conspiracy or multiple conspiracies. We reverse the order of acquittals and the conditional grant of a new trial.

Long was president and business manager of Local 101, a labor union affiliated with the AFL-CIO. Local 101 is located in Kansas City, Missouri, and is a member of the Missouri State Building and Construction Trades Council and the International Union of Operating Engineers. The Trades Council is a labor organization composed of representatives of various building and trades unions and councils, and is located in Jefferson City, Missouri. Elmer J. Cantrell was president of the Trades Council. Cantrell was also a member of the Missouri

House of Representatives. The International is an international union comprised of local unions, and is headquartered in Washington, D.C.

In early 1985, Long approached the Director of the Department of Safety and Health for the International, A. Bennett Hill, Jr., requesting money to promote safety programs in Missouri. Long wanted to implement a cooperative labor-management safety program. Hill told Long that the Trades Council should apply for its own grant from OSHA. Hill received a copy of an application for an OSHA grant signed by Cantrell, and Hill understood that the Trades Council filed the grant application with OSHA, but that OSHA would not fund the program. There was evidence, however, that the Trades Council never filed the application with OSHA. Sometime later, Hill sent Long two $5,000 checks from the International's OSHA grant funds as "seed money" for the Missouri program. The checks were payable to the "Missouri State Building Trades Safety Program."

Long delivered the checks to Edward E. Quick. Quick was a member of the Missouri Senate. Long asked Quick to be the director of the safety program. Cantrell and Quick opened a checking account under the name of "Missouri Building and Trades Council Safety Program," with themselves as signatories, and deposited the $10,000 received from the International in the account. In January 1986 Cantrell and Quick began writing themselves salary checks from the account. By the end of March 1986, the account had been reduced to a balance of approximately $557, which the two then divided between themselves. All told, Quick received approximately $6,500 of the $10,000 and Cantrell received approximately $3,500.

In late May 1986, OSHA audited the International's grant account and disallowed the $10,000 disbursement to the Trade Council. OSHA informed Hill that the money would have to be returned to the International's grant account. Hill told this to Long, and Long assured Hill that the money would be returned. Long stated that the Trades Council did not have the money, but that he would find a way to provide it. Long told Cantrell and Quick that the International needed the money returned. Long told Cantrell that Local 101 would reimburse the money.

In August 1985, a model of a crane and display boards had been prepared for a press conference following a fatal crane collapse on a construction project in Kansas City, Missouri. In the summer of 1987, Long sold these items to a safety consultant, Ernest Jorgensen, an owner and employee of Professional Safety Consultants, Inc., who did some work for the International. Jorgensen sent Long two checks from Professional Safety Consultants, one in the amount of $6,200 for the model and display boards, and another $3,800 check for additional materials consisting of photographs of the crane accident, miscellaneous news clippings, legal pleadings, and a copy of a trade publication. These two checks were deposited in Local 101's bank account on July 16, 1987. On July 21, 1987, at Long's direction, Local 101 sent a $10,000 check to the Trades Council. The Trades Council deposited the $10,000 check into its general account, and at Cantrell's direction, sent a $10,000 check to the International.

This brief outline of events, which we will supplement as necessary in this opinion, led to the filing of a

ten-count indictment against Long, Cantrell, and Quick. Count I charged all three defendants with conspiring to obtain $10,000 from the International for a safety program which was never implemented, in violation of 18 U.S.C. § 371. Counts III through VI charged all three defendants with receiving money unlawfully converted and taken by fraud from the International, in violation of 18 U.S.C. §§ 2, 2314, 2315, and unlawfully transporting checks in interstate commerce in violation of 18 U.S.C. §§ 2 and 2314. Count VII charged Cantrell with embezzling money from the Trades Council, and Quick and Long in aiding and abetting Cantrell in committing that offense, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2. Count VIII charged Long with embezzling assets of Local 101 (specifically, the model, display boards, carrying case, and file of photos and clippings), and Cantrell with aiding and abetting Long in committing that offense, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2.

The remaining counts of the indictment charged a separate conspiracy involving only Long and Cantrell. Count II charged Long and Cantrell with conspiring to embezzle $10,000 from Local 101 to reimburse the International's grant account, in violation of 18 U.S.C. § 371. Count IX charged Long with embezzling $10,000 from Local 101 and Cantrell with aiding and abetting Long in committing that offense, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 2. Count X charged Cantrell with unlawfully transporting a $10,000 check, containing at least $5,000 of funds embezzled from the Trades Council and Long with aiding and abetting Cantrell in committing that offense, in violation of 18 U.S.C. §§ 2 and 2314.

A jury acquitted all three defendants of the charges relating to the first conspiracy (Counts I, III-VIII). The jury convicted Long and Cantrell on the charges relating to the second conspiracy. (Counts II, IX and X).

The district court granted Long and Cantrell's motion for an acquittal. *United States v. Long*, No. 90-00116-01/03-CR-W-5, slip op. at 19-20 (W.D.Mo. Dec. 5, 1990). The court also ruled that its failure to give two of defendants' instructions on the issue of multiple conspiracies constituted sufficient error to merit a new trial, but that the issue was moot because of the acquittals. *Id.* at 19. This was, in effect, a conditional grant of defendants' motion for new trial should the acquittal be set aside on appeal. Fed. R. Crim. P. 29(d). The government appeals the order of acquittals and conditional grant of a new trial.

I.

The government argues that the district court erred by considering only the evidence relating to the counts on which Long and Cantrell were convicted in determining whether sufficient evidence existed to support the jury's convictions, and that sufficient evidence existed to support the convictions.

The district court first considered the evidence relating to Count IX. Count IX charged that Long embezzled money from Local 101, a labor organization, in violation

of 29 U.S.C. § 501(c) and 18 U.S.C. § 2.[1] Section 501(c) holds union officers criminally liable when they embezzle, steal, or unlawfully and willfully abstract or convert a union's funds to their own use or the use of others. *United States v. Welch*, 728 F.2d 1113, 1116 (8th Cir. 1984). "To prove 'willfulness' under section 501(c), the government must show that the union officials possessed fraudulent or criminal intent to deprive the union of its funds." *Id.* Willfulness may be "proved by showing that defendant 'was sufficiently aware of the facts to know that he acted wrongfully and in contravention of the trust placed in him by the union and its members.' " *Id.* (quoting *United States v. Belt*, 574 F.2d 1234, 1238 (5th Cir. 1978)).

This court in *United States v. Goad*, 490 F.2d 1158 (8th Cir.), *cert. denied*, 417 U.S. 945 (1974), held that the elements of a case under 29 U.S.C. § 501(c) are: "(1) fraudulent intent to deprive the union of its funds and (2) lack of authorization according to the union's constitution and bylaws." *Id.* at 1166 (footnote omitted). The district court here declined to follow *Goad*, concluding that lack of authorization was not an essential element of a 501(c) offense. Slip op. at 9. The court reached this conclusion

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[1] 29 U.S.C. § 501(c) provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

by relying on *Welch*. In *Welch*, we rejected the union's argument that the government may prove fraudulent intent under section 501(c) by showing that the conduct did not benefit the union, as intent could not be demonstrated "solely upon proof of an objective criterion." 728 F.2d at 1118. Thus, even though the district court concluded that union authorization or union benefit did not control the question of whether a section 501(c) violation occurred, the court considered those factors relevant to the issue of fraudulent intent. Slip op. at 9-10.

The district court then considered whether sufficient evidence existed to establish fraudulent intent under section 501(c). The court found no dispute that Local 101 sent $10,000 to the Trades Council to reimburse the International, and that neither Long nor Cantrell received any portion of the $10,000 the Trades Council sent to the International. *Id.* at 11. The court stated that although the $10,000 transaction may not have followed the precise duties required by Local 101's constitution and bylaws, the means of recording the transaction were the same as used for every Local 101 financial transaction. *Id.* at 11-12. The court concluded that lack of compliance with the constitution and bylaws could not be used to infer fraudulent intent, as no evidence existed that Long attempted to hide the reimbursement or that the transaction differed from Local 101's usual means of effecting transactions. *Id.* at 12.

The district court also ruled that fraudulent intent could not be inferred merely because Local 101 paid the money back to the International. *Id.* The court reasoned

that although Local 101 had no legal obligation to reimburse the International, Local 101 did have a moral obligation to do so because Local 101, through Long, played a role in obtaining the funds from the International, and as a member of both groups, "had at least a moral interest in the reputation and well-being of both organizations." *Id.* at 13. Based on these findings, the court concluded that there was insufficient evidence that Long possessed fraudulent intent in directing Local 101 to reimburse the International, and therefore, Long was entitled to judgment of acquittal on Count IX. *Id.*

The district court correctly stated the standard that governed its consideration of the sufficiency of the evidence. The same standard governs this court. The district court stated:

> The defendant's conviction must be upheld if, after viewing the evidence in the light most favorable to the government, there is substantial evidence to support the jury's verdict. In reviewing the guilty verdict, we must give the government the benefit of all inferences that may be reasonably drawn from the evidence. The evidence need not exclude every reasonable hypothesis of innocence, but must simply be sufficient to convince the trier of fact beyond a reasonable doubt that the defendant is guilty. If the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb a conviction. Moreover, the . . . court must keep in mind that the standard to be applied to determine the sufficiency of the evidence is a strict one, and the finding of guilt should not be overturned lightly.

Id. at 6-7 (quoting *United States v. Schubel*, 912 F.2d 952, 955 (8th Cir. 1990) (citations omitted)). *See also Glasser v. United States*, 315 U.S. 60, 80 (1942).

The government first argues that the district court erred by failing to consider all of the evidence at trial. The government contends that in ordering acquittals on Counts II, IX, and X, the district court considered only the evidence relating to those counts, and did not consider the evidence relating to those counts in which the jury acquitted Long and Cantrell.

Long and Cantrell do not argue that the district court correctly considered only the evidence relating to the counts in which they were convicted. Instead, pointing to various statements the district court made, they say that it considered all of the evidence in ruling that insufficient evidence existed to prove fraudulent intent.

This court in dealing specifically with charges of converting union funds in violation of 29 U.S.C. § 501(c) and conspiring to violate that statute, made clear that the jury is to "determine fraudulent intent on the basis of 'all the evidence considered together' and in light of 'all the surrounding circumstances.' " *Welch*, 728 F.2d at 1119 (citing *Morissette v. United States*, 342 U.S. 246, 275-76 (1951)). The Supreme Court also instructed in *Jackson v. Virginia*, 443 U.S. 307 (1979), that the sufficiency of the evidence review involves assessment of *"all of the evidence." Id.* at 319 (emphasis in original). In considering the sufficiency of evidence as to certain counts, this court recently considered evidence relating to counts on which a defendant was acquitted. *United States v. Liebo*, 923 F.2d 1308, 1311 (8th Cir. 1991). In so ruling, we relied on *United States v.*

Powell, 469 U.S. 57 (1984), in which the Supreme Court observed that in assessing the sufficiency of evidence, we independently review "the jury's determination that evidence on another count was insufficient." *Id.* at 67. *Accord United States v. Alanis*, 945 F.2d 1032, 1035 (8th Cir. 1991); *United States v. Reed*, 875 F.2d 107, 112 (7th Cir. 1989); *United States v. Finkelstein*, 526 F.2d 517, 527 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976).

Based on the district court opinion before us, it is difficult to determine whether the district court, in concluding that insufficient evidence of fraudulent intent existed, considered all of the evidence adduced at trial or only the evidence relating to the counts in which the jury returned convictions. Nevertheless, even examining the evidence specifically relating to the charges of which Long and Cantrell were convicted, we are convinced that sufficient evidence existed to support the jury's finding of fraudulent intent.

Intent is an issue that turns in large part on the credibility and demeanor of witnesses, and is peculiarly within the province of the factfinder. *United States v. Reeves*, 730 F.2d 1189, 1195 (8th Cir. 1984); *see also Welch*, 728 F.2d at 1119; *United States v. Singer*, 660 F.2d 1295, 1302 (8th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982). The jury must determine the issue of intent from all the circumstances of the case because the element of knowledge is rarely capable of direct proof. *Reeves*, 730 F.2d at 1195. "Any uncertainty concerning the willful intent to commit the act is for the jury to resolve." *United States v. LeRoy*, 687 F.2d 610, 617 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983).

Applying these principles, we are satisfied that sufficient evidence existed to support the jury's finding of Long's fraudulent intent. We have already detailed Hills' demand to Long that the money be returned to the International, Long's response that he would find a way to provide it, his telling Cantrell and Quick of the demand, and his telling Cantrell that Local 101 would reimburse the money.

Long then sold the model crane and display boards to Jorgensen. On May 18, 1987, Jorgensen sent Long a $6,200 check payable to "Local Union 101 – IUOE" for these items. On May 28, 1987, Long sent a letter to Hill telling him that he would be receiving a $10,000 check from the Trades Council within the next thirty days. Long later offered Jorgensen additional materials about the crane collapse consisting of a file of articles, photographs, and other miscellaneous materials. On July 9, 1987, Jorgensen sent Long a $3,800 check payable to "Local Union 101 – IUOE" for these items. The letter accompanying the check stated the payment was for materials relating to the "Hyatt Regency disaster." However, no such materials were delivered to Jorgensen.

Both checks were deposited in Local 101's bank account on July 15, 1987. On July 21, 1987, Long directed Marie Plummer, Local 101's bookkeeper, to issue a $10,000 check to the "Missouri State Building Trades Safety Program." Long told Plummer that Local 101 would be reimbursed for the $10,000. Plummer recorded the check in Local 101's financial records as a "reimbursable expense." The check was signed by Long and a facsimile stamp was used for the signature of Local 101's treasurer, John Foster.

Donna Sanford, Cantrell's personal secretary and secretary for the Trades Council, testified that on July 22, 1987, she was given a $10,000 check from Local 101 for deposit, and at Cantrell's direction, she issued a $10,000 check to the International on July 24, 1987. Sanford asked Cantrell how to list the check on the financial report, and she recorded the transaction as a "special fund in" and "special fund out." Sanford also asked Trades Council's accountant how to record the transaction, and the accountant confirmed that she had properly recorded the transaction.

The Trades Council minutes reflect that Long attended a meeting of the Trades Council in Jefferson City, Missouri, on July 22, 1987, the same day that the Trades Council received the $10,000 check from Local 101. Cantrell chaired this meeting. Neither Long nor Cantrell disclosed to the Trades Council that the International was demanding repayment of the $10,000 it sent to the Trades Council, that the Trades Council had received $10,000 from Local 101, or that the Trades Council was going to send $10,000 to the International.

Local 101's bylaws state that the powers and duties of the officers are defined in the Constitution of the International. The duties of the treasurer include receiving and holding all funds collected by the financial secretary, giving receipts for such funds collected, and reporting on the financial condition and transactions of the union. The constitution prohibits the treasurer from disbursing union funds without the local union's approval and only upon the order of the president and recording secretary.

In addition, the constitution requires that the treasurer and president co-sign all checks, that the recording secretary sign all orders on the treasurer for checks, and that the financial secretary keep an accounting of all union finances. The constitution also provides that the trustees supervise the funds and properties of the union. John Foster, Local 101's treasurer, testified that he did not know that Local 101 received $10,000 from Jorgensen, or that Local 101 had sold the model crane or display boards. Foster also testified that he did not authorize or know that Local 101 sent $10,000 to the Trades Council, or of any obligation requiring Local 101 to send $10,000 to the Trades Council. Shaw, Local 101's financial secretary, testified that he did not know of any obligation or reason requiring Local 101 to send $10,000 to the Trades Council.[2] Roger Kaminska, a trustee of Local 101, testified that he did not authorize or know that Long sold the model crane, display boards, or other items to Jorgensen.

Shaw testified about the procedures Local 101 used to report income and approve expenditures. He stated

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[2] Shaw also admitted that "it would have been an impossibility" to report every receipt and expenditure to the Executive Board and membership. From this, Long argues that Shaw's testimony shows that the expenditure to the Trades Council was reflected according to Local 101's custom and practice and not evidence of fraudulent intent. Shaw, however, clarified this statement by agreeing that Local 101's sending of $10,000 to the Trades Council was an "unusual item." There was evidence that other non-recurring transactions such as the use of funds for political contributions, advertising, charitable donations, and acceptance of an offer on a sale of property, were discussed and voted on in Executive Board meetings and general meetings.

that he prepares a monthly financial report from the bookkeeper's information listing income and expenditures and submits the report to the Executive Board. The Executive Board then votes on whether to approve the payment of bills, and its action is recorded in the Executive Board minutes. The Executive Board minutes are then read to the general membership at the regular union meeting, and the general membership votes on whether to approve the Executive Board minutes. The checks from Jorgensen to Local 101 and the $10,000 check from Local 101 to the Trades Council were not reflected on Local 101's monthly financial report or in the Executive Board or union meeting minutes.

Long argues that the district court correctly concluded that the government failed to prove fraudulent intent. Long points to the following circumstances which he asserts conclusively establish a lack of fraudulent intent: (1) compliance with Local 101's customs and practices; (2) Local 101's documentation of the transactions; and (3) Local 101's obligation to reimburse the International. Long also points to the statements of Louie Wright, a labor union consultant, in an offer of proof, that Long's actions were authorized by the language and history of Local 101's constitution, and by Local 101's custom and practice.

It is true, as Long vigorously argues, that there was substantial evidence that Long complied with the custom and practice of Local 101 in recording the receipt of the $10,000 from Jorgensen, disbursing the $10,000 to the International, and reporting such information to the Executive Board and membership. For example, Foster (Local 101's treasurer) explained that he did not receive the

monies for Local 101 or review the list of monies received, deposits made, or checks issued by the union, and that his signature stamp was often used to sign checks, despite the contrary requirements set forth in the constitution. There was also evidence explaining that Local 101's receipt of $10,000 from Jorgensen and issuance of $10,000 check to the Trades Council were reflected in underlying cash receipts and disbursement journals, check registers, and bank deposit slips, but were not reflected in the summarized financial reports because the transactions were a "wash."

Nevertheless, in light of the evidence recounted above, that the transactions in question were recorded consistently with Local 101's custom and practice does not in and of itself negate a jury finding of fraudulent intent. There was evidence that Long did not inform the union members about selling the model, display boards, and other items to Jorgensen for $10,000 and using the proceeds to reimburse the International, and that as president of the union, he was obligated to do so. From this evidence, a jury could reasonably infer that Long wrongfully, and in contravention of the trust placed in him by the union members, abstracted funds from Local 101. Moreover, the evidence that Long told Plummer the $10,000 Local 101 paid to the Trades Council was "reimbursable" makes the recording of the transaction suspect, and in itself creates evidence from which the jury could have inferred Long's intent to conceal the transaction from the union. The jury could reasonably have inferred that the $10,000 payment to the Trades Council was not "reimbursable," but rather, Local 101's sale of union

assets to Jorgensen and a transfer of the sale proceeds to the Trades Council.

Long relies on *United States v. Hart*, 417 F. Supp. 1314 (S.D. Iowa 1976), to support his position that his actions were authorized, and thus, he acted without the requisite fraudulent intent to violate section 501(c). In *Hart*, the government charged the president of a union with violating section 501(c) because he paid the legal fees and fines incurred by certain union members. *Id.* at 1315. The district court, after a bench trial, acquitted Hart holding that the government failed to prove fraudulent intent. In so ruling, the court found the following circumstances persuasive:

> All payments which are the subject of the indictment were openly and properly recorded in the union's ledger books. General discussions were had at board meetings regarding the pending criminal cases, and on one such occasion specific cases were discussed by the defendant. Whenever he was asked, the defendant fully answered any questions regarding the payments. There is simply no basis from which an intent to conceal facts from the union or deceive its members can be inferred.

Id. at 1322 (citation omitted).

Here, in contrast to the circumstances outlined in *Hart*, it is undisputed that Long never discussed with the union board, officers, or members the transactions in question. Moreover, *Hart* was tried before a district court judge, and the quoted passage does not deal with a jury finding of fraudulent intent. *Hart*, thus, is of no help to Long.

We also cannot conclude that Local 101's "moral obligation" to reimburse the International can necessarily negate the jury's finding of fraudulent intent. From the evidence outlined above, the jury could have reasonably inferred that Local 101 had no obligation to reimburse the International, and thus, the jury finding must stand. *See Schubel*, 912 F.2d at 955.

Facts that were more material to the counts of which Long and Cantrell were acquitted give further support to our conclusion that there was sufficient evidence for a jury to conclude that Long possessed the requisite fraudulent intent to deprive the union of its funds in violation of section 501(c). Long obtained $10,000 from the International and passed the money on to Cantrell for the safety program. The Trades Council minutes report only that Cantrell mentioned the possibility of getting an OSHA grant to initiate a safety program and that Cantrell was authorized to look into the matter and, if successful, proceed to initiate a program. Besides this brief mention, the minutes reflect nothing more about a safety program. Cantrell did not tell the Trades Council board or membership that the Trades Council received $10,000 from the International for a safety program, that a separate account had been opened with himself and Quick as signatories, or that the account had been depleted by salary expenditures to himself and Quick. Cantrell did not report on any activity associated with the safety program. Walter Roseburrough, a trustee, and three members of the Executive Board all testified that they were not aware of anything about a safety program beyond the minute reference in the council minutes.

The evidence about the work Cantrell and Quick performed for their "salaries" from the safety program monies also raises an inference of fraudulent activity. Cantrell claimed to have worked weekends and nights in January 1986 on a computer list of contractors which he gave to Quick. Quick claimed to have phoned four or five of the contractors, but he could not recall any of the contractors' names. There was evidence which indicated that the contractor list Cantrell allegedly compiled had been prepared by clerical staff and paid for by the Trades Council in their effort to keep abreast of identifying union contractors. Cantrell's Mastercard records reflected that he was not in Jefferson City, Missouri, during much of the time that he claimed to have been preparing or updating the list. Ellis, the secretary-treasurer for the Trades Council, who is required to co-sign all checks and make financial reports for the Trades Council, testified that he was unaware of a safety program, the existence of a separate bank account, the receipt of the two $5,000 checks used to open the account, or how the funds were spent. A number of representatives from the Missouri Builders Association testified about their interest in construction safety. They all testified that they knew or knew of Cantrell, Quick, and Long, and that they had not been contacted about a safety program and were unaware of the existence of the Trades Council safety program.

From this evidence, the jury could reasonably question the propriety of the $10,000 in disbursements to Cantrell and Quick. Long had a hand in obtaining the $10,000 from the International, told the International that the money would be reimbursed, and told Cantrell that

Local 101 would reimburse the International. This evidence, coupled with that we have discussed above, further supports the jury's finding of fraudulent intent.[3] Accordingly, we reverse the district court's order of acquittal of Long on Count IX.

II.

The district court also acquitted Cantrell on Count IX. Slip op. at 13. The court concluded that Cantrell could not be guilty of aiding and abetting Long of violating section 501(c) when insufficient evidence existed that Long possessed the requisite fraudulent intent to violate section 501(c). *Id.* The court further stated that there was no evidence that Cantrell: (1) knew anything more than that Long was attempting to acquire funds to reimburse the International; or (2) knew how Long would obtain the funds. *Id.* at 14. The court concluded that Cantrell did not " 'associate himself with the venture,' " and thus, could not be found guilty of aiding and abetting Long in violating section 501(c). *Id.* (citing *United States v. Lard*, 734 F.2d 1290, 1298 (8th Cir. 1984)).

Cantrell argues that he cannot be found guilty of aiding and abetting Long in violating section 501(c) because: (1) Long had no fraudulent intent; and (2) Cantrell did not participate in the alleged embezzlement from

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[3] Long also argues that he acted in good faith, and thus, could not be found guilty of violating section 501(c). The court instructed the jury, however, that good faith was a complete defense to all charges, and the jury rejected this defense. In light of the evidence outlined, we reject Long's argument.

Local 101 or know anything about the means of how the money would be reimbursed.

We reject Cantrell's first argument in light of our holding in Part I, *supra*. We also reject Cantrell's second argument because we are satisfied that sufficient evidence existed that Cantrell shared in Long's criminal intent. *Lard*, 734 F.2d at 1298 (to be guilty of aiding and abetting defendant must share in the principal's essential criminal intent). Cantrell received approximately $3,500 of the $10,000 received from the International. Cantrell knew that the International demanded the return of the $10,000, and that Local 101 would reimburse the $10,000 to the International. Cantrell knew that Local 101 sent $10,000 to the Trades Council for the purpose of reimbursing the International. Although Cantrell may not have known the exact means Long used to obtain the funds from Local 101, as discussed, evidence existed from which the jury could have reasonably inferred that Local 101 had no obligation to reimburse the International for the safety program, and thus, that Long wrongfully obtained the funds from Local 101.

Moreover, from the evidence that Local 101 officers (other than Long) did not know that Local 101 sent $10,000 to the International, did not authorize the expenditure, did not know about the safety program, and did not know about the need to reimburse the International, the jury could infer that the funds were wrongfully obtained from Local 101. The $10,000 check from Local 101 went into the Trades Council account and, pursuant to Cantrell's direction, was sent to the International without the knowledge of the officers or members of the Trades Council. As discussed, there was evidence that

members of the Trades Council's executive board did not know about the existence of the safety program, the receipt of $10,000 from the International, that Cantrell and Quick opened a separate account, and depleted the account by making disbursements to themselves.

From this evidence, the jury could infer that Cantrell shared in Long's criminal intent, and thus, the district court erred in ordering Cantrell's acquittal on Count IX.

III.

The district court also concluded that there was insufficient evidence to support either Long or Cantrell's convictions on Count X. Count X charged that Long and Cantrell caused the Trades Council check to move in interstate commerce, knowing that the check had been stolen, converted, or taken by fraud. The court ruled that the evidence established only that Long sent a check from Local 101 to the Trades Council for the sole purpose of the Trades Council's sending the funds on to the International. Slip op. at 14. The court observed that the government failed to prove the Trades Council's check was stolen as the deposit of the funds from Local 101 in the Trades Council's account did not make those funds the property of the Trades Council. *Id.* We believe it is for the jury to determine whether a check payable to the Trades Council, deposited in its account, constitutes property of the Trades Council. The district court preempted the jury's responsibility in making this finding of fact.

As discussed in Part I and II, *supra*, we believe sufficient evidence existed from which the jury could have inferred that the funds from Local 101 were "stolen,

converted, or taken by fraud." It is undisputed that the funds from Local 101 were passed on to the Trades Council and to the International. Thus, sufficient evidence existed to support the jury's finding of guilt on Count X, and the district court erred in ordering acquittals for Long and Cantrell on Count X.

IV.

The district court also ruled that there was insufficient evidence to support Long or Cantrell's convictions on Count II for conspiring to embezzle funds from a union.[4] The court ordered acquittals because it concluded that no evidence of an agreement to commit an illegal act existed. Slip op. at 15 (citing *United States v. Peyro*, 786 F.2d 826, 829 (8th Cir. 1986)). The court observed that Long and Cantrell agreed only to reimburse the International for the $10,000 provided from the International's grant account, and that such a reimbursement did not amount to an illegal act. Slip op. at 15-16. The court

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[4] Long and Cantrell also argue that the Trades Council is not a "labor organization" for purposes of a violation of 29 U.S.C. § 501(c). Long and Cantrell raised this issue during trial. The district court stated that it appeared that the Trades Council is a "labor organization," as defined in 18 U.S.C. § 402(i) or (j), but that the issue was a "legal question dependent on a wide array of factual characteristics of the [Trades Council]." *United States v. Long*, No. 90-00116-01/03-CR-W-5, slip op. at 2, (W.D. Mo. Sept. 24, 1990). Count II charges the agreement to embezzle funds from Local 101 and not from the Trades Council, thus, the status of the Trades Council as a labor union is not critical.

reasoned that even assuming that the means by which Long intended to obtain the funds was illegal, there was no evidence from which it could be inferred that Cantrell agreed to or knew how Long would obtain the money. *Id.* at 16.

Cantrell and Long argue that the government's basis for sustaining their convictions on this count is based purely on circumstantial evidence, and that to sustain a conviction on purely circumstantial evidence, such evidence must not only be consistent with the defendant's guilt, but must also be inconsistent with innocence. *Cartello v. United States,* 93 F.2d 412, 414-15 (8th Cir. 1937). Long and Cantrell argue that since there was no direct evidence of a conspiratorial agreement and because the circumstantial evidence was consistent with innocence, the court correctly ordered acquittals on Count X.

Because a conspiratorial agreement is usually clandestine, it is frequently incapable of proof by direct evidence. *See United States v. Raymond,* 793 F.2d 928, 932 (8th Cir. 1986) (circumstantial evidence giving rise to a strong inference of agreement between participants is sufficient to establish a conspiracy). We held in *United States v. Jacobson,* 536 F.2d 793 (8th Cir.), *cert. denied,* 429 U.S. 864 (1976), that "circumstantial evidence does not fail simply because it may infer innocence as well as guilt." *Id.* at 796 (citing *Holland v. United States,* 348 U.S. 121, 139-40 (1954)).

We are persuaded that the totality of the evidence supports the jury's finding that a conspiratorial agreement to embezzle money from Local 101 existed. Long told Cantrell that the International must be reimbursed

the $10,000 the Trades Council received for the safety program. Cantrell received $3,500 as salary from the safety program in a period of less than three months, and there is little to establish what Cantrell did to earn this salary. Long told Cantrell that Local 101 would reimburse the International. If the International required the money to be reimbursed and Local 101 did not do so, then a jury could reasonably infer that the International would call on the Trades Council to reimburse the money. The membership of the Trades Council, other than Cantrell, knew nothing about the existence of the safety program, the existence of the separate bank account, or the depletion of the account by salary disbursements to Quick and Cantrell. A jury could reasonably infer that Cantrell had an interest in not paying back the money personally, and that Long did not wish for him to do so. This inference would allow a jury to conclude that Long and Cantrell agreed to obtain the funds from Local 101. Moreover, the sale of the Local 101 property for $10,000, and the transfer of the $10,000 to the Trades Council also evidence an agreement to embezzle money from Local 101.

Sufficient evidence existed to support the jury's convictions on Count X, and thus, the district court erred in ordering acquittals on this count.

V.

Finally, the government argues that the district court erred in concluding that its failure to instruct the jury on the issue of single versus multiple conspiracies constituted a sufficient error to merit a new trial. Slip op. at 19. Although holding the issue moot because of its order of

acquittals, the district court concluded that a "reasonable argument" existed that it had erred in refusing to submit two instructions (17 and 45) offered by the defendants to the jury, and that a new trial was warranted. *Id.* at 17.

The question of whether one or two conspiracies exists is a jury question. *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987). Long and Cantrell argue that there was only one conspiracy, and that the court erred in refusing to instruct the jury on the issue of one versus two conspiracies. They argue that the second conspiracy count (Count II) alleged a conspiracy to conceal the acts alleged in the first conspiracy count (Count I), and so, the two counts were multiplicitous. Finally, they assert that because they were acquitted on the first conspiracy, they must be acquitted on the second conspiracy.

The government argues that the district court erred in conditionally granting a new trial because the instructions Long and Cantrell offered (Instructions 17 and 45) did not submit the issue of a single versus multiple conspiracies.

Instruction 17[5] offered by defendants directed the jurors to: determine whether the conspiracy charge

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[5] The instruction provided:

> Proof of several separate conspiracies is not proof of the single, over all conspiracy charged in the indictment unless one of the several conspiracies which is proved is a single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you

(Continued on following page)

existed; identify the members of the conspiracy; and acquit any defendant not a member of the conspiracy. The district court covered the substance of this instruction by other instructions, (Inst. 15, 16, 17, and 19), and thus, did not abuse its discretion in refusing the defendants' proposed instruction. *United States v. Brown*, 584 F.2d 252, 259 (8th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).

Instruction 45 read: "If you find the government has failed to prove the existence of only one conspiracy, you must find the Defendants not guilty." This instruction does not raise the issue of a single versus multiple conspiracies.

Long and Cantrell cite nothing in the instruction conference transcript showing that they requested an instruction on the issue of one versus two or more conspiracies. Nevertheless, the defense did raise the issue in a pre-trial motion to dismiss, and in any event, we are satisfied that the district court did not err in failing to charge the jury because the indictment and proof at trial consisted of two separate conspiracies. When the

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(Continued from previous page)

find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who are members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty, you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

evidence does not support the giving of a multiple conspiracy instruction, the failure to do so is not error. *United States v. Davis*, 882 F.2d 1334, 1341-42 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 1472 (1990).

In determining whether there is one conspiracy or two, the crucial concern "is the scope of the conspiratorial agreement, for it is that which determines . . . the duration of the conspiracy." *Grunewald v. United States*, 353 U.S. 391, 397 (1957). In *Grunewald*, the defendants obtained "no prosecution" rulings from the IRS by bribing IRS officials. *Id.* at 394-95. Subsequent activities of the conspirators were directed at concealing the irregularities in obtaining these rulings. *Id.* at 395. The Supreme Court concluded that subsequent concealment activities did not extend the conspiracy directed at obtaining the rulings, so as to bring those earlier activities within the statute of limitations period. *Id.* at 405.

In so ruling, the Supreme Court stated:

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime. Thus the Government argues in its brief that "in the crime of kidnapping, the acts of conspirators in hiding while waiting for ransom would clearly be planned acts of concealment which would be in aid of the conspiracy to kidnap. So, here, there can be no doubt that . . . all acts of concealment, whether to hide

> the identity of the conspirators or the action theretofore taken, were unquestionably in furtherance of the initial conspiracy . . . " We do not think the analogy is valid. Kidnappers in hiding, waiting for ransom, commit acts of concealment in furtherance of the objectives of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases, the successful accomplishment of the crime necessitates concealment. More closely analogous to our case would be conspiring kidnappers who cover their traces after the main conspiracy is finally ended – i.e., after they have abandoned the kidnapped person and then take care to escape detection. In the latter case, as here, the acts of covering up can by themselves indicate nothing more than that the conspirators do not wish to be apprehended – a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord.

Id. at 405-06 (footnote omitted).

In determining whether one or two conspiracies exist for purposes of determining whether double jeopardy bars a prosecution, the two conspiracies are examined by comparing the: (1) time; (2) persons acting as co-conspirators; (3) offenses charged; (4) overt acts; and (5) loci of the conspiracies. *United States v. Thomas,* 759 F.2d 659, 662 (8th Cir. 1985) (subsequent history omitted).

Applying these principles, we are convinced that the district court did not err in failing to charge the jury on the issue of one versus multiple conspiracies. The evidence conclusively established two separate conspiracies. The first conspiracy (Count I) involved Long, Cantrell, and Quick's obtaining money from the International and

using those funds. The second conspiracy arose only after OSHA audited the International's grant account. The mere fact that the second conspiracy may have been motivated by a desire to conceal the first conspiracy does not in and of itself convert the two conspiracies into one. *Grunewald*, 353 U.S. at 402 ("Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators.") Here, the two conspiracies were separated by time, and involved only two of the three same individuals. Although the statutory offenses charged were the same, the overt acts were different – Count I involved Long, Cantrell, and Quick obtaining funds from the International to set up a safety program, and Count II involved Long and Cantrell obtaining funds from Local 101 to reimburse the International. The underlying activities of both alleged conspiracies involved separate objectives and agreements. Accordingly, the district court erred in conditionally ordering a new trial.

We reverse and remand the case to the district court to enter judgments of convictions, and to proceed to sentence Long and Cantrell.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	No. 90-00116-01/ 03-CR-W-5
Plaintiff,	)	
vs.	)	
SAM F. LONG, EDWARD E. QUICK and E. J. CANTRELL,	)	
Defendants.	)	

ORDER

(Filed Dec. 5, 1990)

Before this Court are the motions of defendants Cantrell and Long for judgment of acquittal, arrest of judgment and new trial. Each of these motions will be addressed individually below. Defendants' motion for arrest of judgment will be denied, defendants' motion for new trial will be denied as moot and defendants' motion for judgment of acquittal will be granted.

Background

On June 14, 1990, a Grand Jury indictment was filed charging ten counts. Count One charges defendants Long, Quick and Cantrell with conspiracy to commit several offenses under 18 U.S.C. §§ 2314 and 2315 and 29 U.S.C. § 501(c) all in violation of 18 U.S.C. § 371. It alleges that the defendants conspired to obtain money from the International Union of Operating Engineers ("IUOE") in

Washington, D.C., for a safety program to be operated under the auspices of Missouri State Building and Construction Trades Council ("MSBCTC). It also alleges that the program was never implemented and that no measurable work was done toward implementing the program.

Counts Three through Six of the indictment charge all defendants with transportation and receipt of checks moving between the IUOE and the MSBCTC. These funds were for the implementation of the safety program.

Count Seven charges all defendants with embezzling the above-mentioned funds from the MSBCTC.

Count Two charges defendants Long and Cantrell with a separate conspiracy to commit other offenses under 19 U.S.C. § 501(c) and 18 U.S.C. § 2314. It alleges a conspiracy to pay back the IUOE funds which, as a result of an Occupational Safety and Health Administration ("OSHA"), needed to be returned to the IUOE's grant account. Defendants Long and Cantrell allegedly conspired to embezzle funds from Local Union 101 to obtain the funds to be returned to the IUOE.

Count Eight charges defendants Long and Cantrell with embezzling assets consisting of display boards and a carrying case from Local Union 101.

Count Nine charges defendants Long and Cantrell with embezzling $10,000.00 from Local Union 101 for the purpose of transferring that sum to the MSBCTC.

Count Ten charges defendants Long and Cantrell with transporting in interstate commerce a check in the amount of $10,000.00 while knowing the check to be

stolen, converted or taken by fraud. This count is based on the transfer of funds from the MSBCTC to the IUOE.

The jury returned a verdict finding defendant Quick not guilty on all counts under which he was charged. The jury found defendants Long and Cantrell not guilty on Counts One, Three, Four, Five, Six, Seven and Eight and guilty on Counts Two, Nine and Ten.

The following evidence was adduced at trial.

Defendant Long, at the pertinent times, was President and Business Manager of Local Union 101. Defendant Cantrell was President of the MSBCTC and a representative to the Missouri legislature. Defendant Quick was a Senator in the Missouri legislature. Local Union 101 is a member of both the IUOE and the MSBCTC.

In early 1985 the Director of Safety and Health for the IUOE, at the direction of the President of the IUOE, discussed with defendant Long the possibility of the IUOE providing funds for a safety program in Missouri. After some further discussions between the defendants and between other parties, the IUOE sent two checks, each in the amount of $5,000.00, to the MSBCTC safety program. The checks were dated December 15, 1985, and February 17, 1986, and were sent to defendant Long.

Defendant Long forwarded the checks to defendants Quick and Cantrell, who opened a checking account under the name of Missouri State Building and Construction Trades Safety Program. Funds from the Safety Program checking account were used to pay the salaries of

defendants Quick and Cantrell as director and administrator of the Safety Program.

By April of 1986, the funds provided by the IUOE were all but depleted. No further funding was obtained, and the Safety Program checking account was closed. What little money remained was deposited in a MSBCTC account. Checks totalling the amount deposited were issued to defendants Quick and Cantrell.

Subsequent to these events, OSHA audited the IUOE grant account from which IUOE provided the checks for the MSBCTC safety program. OSHA concluded that these transactions should be disallowed because they were not included as a line item of the IUOE grant.

On being notified of this disallowance, the IUOE Director of Safety and Health called defendant Long and told him that the money would have to be returned. Defendant Long told the IUOE Director that he would see to it that the money was returned.

Defendant Long then called defendant Cantrell and asked that the money be returned to the IUOE. Defendant Cantrell informed defendant Long that the funds had been depleted. Defendant Long told defendant Cantrell that Local 101 would provide the funds to be returned to the IUOE. Defendant Long then informed the IUOE Director of Safety and Health that the MSBCTC did not have funds to reimburse the $10,000.00 but that he would find a way to provide that money.

Defendant Long then arranged to sell a model crane and assorted display boards and materials to an independent safety consultant, a Mr. Jorgensen. The display

boards and a carrying case for the model crane had been purchased with Local Union 101 funds. The model crane and accompanying materials had been put together following a crane collapse in Kansas City, Missouri, in August of 1985.

The model crane was used by defendant Long and others in a successful attempt to persuade OSHA to reverse a determination that the crane had collapsed because of operator error. These materials were later used by defendant Long in a presentation at a safety conference. At the time defendant Long arranged for their sale, they were being stored in various rooms at Local Union 101's offices.

These materials were sold by defendant Long to Mr. Jorgensen for $6,200.00. Defendant Long subsequently sold Mr. Jorgensen additional materials for $3,800.00.

The checks received from Mr. Jorgensen were deposited into a Local Union 101 checking account. On July 21, 1987, defendant Long directed the Local Union 101 bookkeeper to issue a check in the amount of $10,000.00 made payable to the MSBCTC, which she did. The check was then signed by defendant Long and signature stamped with the signature stamp of the Local Union 101 treasurer.

Bundles of Local Union 101 checks were introduced at trial. Many of these checks were signed by defendant Long and signature stamped with the treasurer's name. Similarly, many of the checks were signed by the Local Union 101 treasurer and signature stamped with defendant Long's name. At least one check was signature

stamped with both the president's and the treasurer's names.

On July 22, 1987, defendant Cantrell's secretary received the Local Union 101 check and deposited it into the MSBCTC checking account. At the direction of defendant Cantrell, a check in the amount of $10,000.00 was then issued by MSBCTC to the order of the IUOE and sent to the IUOE's offices.

Motion for Judgment of Acquittal

Defendants Long and Cantrell move for judgment of acquittal on several different grounds. These grounds will be discussed separately below.

Insufficient Evidence

The standard under which this Court reviews the sufficiency of the evidence in a criminal case has recently been summarized by the Eighth Circuit:

> The defendant's conviction must be upheld if, after viewing the evidence in the light most favorable to the government, there is substantial evidence to support the jury's verdict. In reviewing the guilty verdict, we must give the government the benefit of all inferences that may be reasonably drawn from the evidence. The evidence need not exclude every reasonable hypothesis of innocence, but must simply be sufficient to convince the trier of fact beyond a reasonable doubt that the defendant is guilty. If the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb a conviction. Moreover, the . . . court must keep

> in mind that the standard to be applied to determine the sufficiency of the evidence is a strict one, and the finding of guilt should not be overturned lightly.

United States v. Schubel, 912 F.2d 952, 955 (8th Cir. 1990) (citations omitted).

Substantial portions of the parties' briefs are devoted to an analysis of the facts relevant to all of the counts for which the defendants were indicted. As the jury found that each defendant was not guilty on all counts except Counts Two, Nine and Ten, this Court believes it more appropriate to apply the above standard to the evidence which is material to these latter counts. This is so particularly since it is the government's contention that the counts on which the jury found defendants Long and Cantrell guilty involve a separate and distinct conspiracy.

The crux of defendants' contentions centers on Count Nine of the indictment. Under Count Nine, defendant Long is charged with "embezzling, stealing or unlawfully and willfully abstracting or converting the moneys, funds propertys and assets of a labor organization" in violation of 29 U.S.C. § 501(c).

Defendants argue, in part, that "lack of authorization" and "lack of benefit to the union" are essential elements to this crime. Because the government did not produce sufficient evidence as to these elements, defendants contend, defendants must be acquitted of this charge. This Court does not agree.

The Eighth Circuit has reviewed at length the issue of whether lack of benefit to the union is an essential element to a charge under § 501(c). *United States v. Goad*, 490

F.2d 1158, 1161-1165 (8th Cir. 1974). It concluded that "[i]f the Government establishes fraudulent intent and lack of proper authorization, it should not also be saddled with an additional burden of proving lack of benefit to the union." *Goad*, 490 F.2d at 1165. This conclusion, however, was not without some qualifications. The *Goad* court narrowed the application of this rule by finding that "lack of union benefit need [not] be established when the funds are *unauthorizedly* expended. . . . " *Id.* (emphasis in original).

This decision explicitly left unanswered whether a union official violates § 501(c) "when the members themselves have authorized union officials to expend union funds for non-union purposes." *Goad*, 490 F.2d at 1166.

Although the Eighth Circuit has not yet found it necessary to answer this latter issue, it has been confronted with a similar question. In *United States v. Welch*, union officials were charged with violations of § 501(c) when they, as members of the union executive board, passed resolutions granting vacation and severance pay to themselves and others in accordance with the union's constitution and by-laws. 728 F.2d 1113, 1117 (8th Cir. 1984).

In discussing the essential elements of a § 501(c) violation, the court found that "[u]nion authorization, however, does not completely insulate defendants from the reach of section 501(c)." *Welch*, 728 F.2d at 1117. The court went on to discuss the tests developed and elements required in other circuits concerning alleged violations of § 501(c). Without explicitly deciding what type of authorization, if any, would be a defense to a § 501(c)

charge, the court concluded that "under any test, union officials violate section 501(c) only when they possess fraudulent intent to deprive a union of its funds." *Welch*, 728 F.2d at 1118.

In developing an appropriate verdict directing instruction for Count Eight, this Court concluded that the *Welch* opinion indicated that union authorization was not an essential element to a § 501(c) charge. While the third element in this instruction does say that the jury must find that defendant "Long, without authorization, embezzled, stole, or unlawfully and willfully abstracted or converted to his own use or the use of another, the moneys, funds, property and assets of Local 101," this Court did not mean to indicate that lack of authorization was an essential element. Rather, because the government charged in the indictment and elicited evidence at trial that defendant Long lacked authorization, this Court concluded that such allegation should be part of the instruction.

This Court's reading of *Welch*, that lack of authorization is not an essential element, is similar to interpretations by other circuits. The Fourth Circuit, for example, found that the Eighth Circuit in *Welch* "abandoned the distinction between "authorized" and "unauthorized" expenditures and hold[s] that an expenditure or appropriation violates § 501(c) if the defendant acted with 'fraudulent intent.' " *United States v. Stockton*, 788 F.2d 210, 215 (4th Cir. 1986). Similarly, the Seventh Circuit found that *Welch* stands for the proposition that "authorization (or lack of) for the act is but one factor bearing on intent, as is proof that the union reaped no benefit from

the act." *United States v. Floyd*, 882 F.2d 235, 240 (7th Cir. 1989).

In reviewing the sufficiency of the evidence, whether or not the Union benefitted from defendant Long's acts and whether or not defendant Long's acts were authorized by the Union are neither one decisive on the issue of whether defendant Long violated § 501(c). Rather the presence or absence of these facts go to the weight of the evidence of fraudulent intent.

Welch, in addition to its determination that authorization is not a complete defense to a § 501(c) violation, indicates clearly the fraudulent intent necessary for a conviction under § 501(c):

> Section 501(c) does not hold union officials strictly liable for misuse of union funds. By its very terms, the statute holds union officials criminally liable only when they embezzle, steal, or *unlawfully* and *willfully* abstract or convert to their own use or the use of others the funds of the union. To prove "willfullness" under section 501(c), the government must show that the union officials possessed fraudulent or criminal intent to deprive the union of funds.

Welch, 728 F.2d at 1116 (citations omitted; emphasis in original). "Willfullness" under § 501(c), the court explains, "is proved by showing that defendant 'was sufficiently aware of the facts to know that he was acting wrongfully and in contravention of the trust placed in him by the union and its members." *Welch*, 728 F.2d at 1116 (quoting *United States v. Belt*, 574 F.2d 1234, 1238 (5th Cir. 1978)). As stated in *Goad*, "willfulness" is frequently defined as an " 'act (or omission) . . . committed (or

omitted) by defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident or in good faith.' " *Goad*, 490 F.2d at 1166, n. 10.

This Court has reviewed the entire transcript of evidence presented at trial. It is undisputed that the $10,000.00 check issued by Local Union 101 was issued for the purpose of reimbursing the IUOE. It is also undisputed that this money was reimbursed to the IUOE at the IUOE's request. Neither defendant Long nor defendant Cantrell received any portion of the money sent to IUOE via the MSBCTC.

The government places great significance on defendants' fiduciary responsibilities and the lack of dissemination to Union members of the particulars of the $10,000.00 transaction. It also finds the lack of explicit pre-authorization by the Local Union 101 executive board or membership to be a significant indication of fraudulent intent.

This Court cannot agree. The $10,000.00 transaction may not have followed the precise duties language of the constitution and by-laws of Local Union 101, particularly as interpreted by the government. However, the evidence shows that the means of accomplishing this transaction, and the means of recording it in Local Union 101 records, were exactly the same means used for every Local Union 101 financial transaction.

There was no evidence presented that defendant Long attempted to hide, coverup or conceal the means by which he effected a reimbursement to the IUOE from Local Union 101. There was no evidence that the means of

accomplishing this transaction were in the least bit unusual.

In isolation, the $10,000.00 transaction on which Count Nine is based may be viewed to imply an ulterior motive in that it did not precisely comply with the procedures prescribed by the Local Union 101 constitution and by-laws. Fraudulent intent, however, must be determined "on the basis of 'all the evidence considered together' and in light of 'all the surrounding circumstances.'" *Welch*, 728 F.2d at 1119 (quoting *Morissette v. United States*, 342 U.S. 246, 275-76, 72 S.Ct. 240, 256 (1952). Where, as here, there is no evidence that the means of effecting the complained-of transaction differed from the usual means of effecting transactions, such means cannot be used to infer fraudulent intent.

The government also suggests that the $10,000.00 reimbursement to IUOE implies a fraudulent intent because Local Union 101 had no legal, ethical or moral obligation to make such a reimbursement. While it is true that Local Union 101 had no legal obligation to make the reimbursement, it is also true that no entity other than IUOE had such an obligation. It was the IUOE, after all, that was found to have made the disbursement in contravention to OSHA requirements.

Additionally, this Court cannot agree that Local Union 101 had no ethical or moral obligation to reimburse the IUOE. Local Union 101, through defendant Long, played a role in obtaining the IUOE funds for the Safety Program. It is also a member of the IUOE as well as the MSBCTC. It had at least a moral interest in the reputation and well-being of both organizations.

In sum, there is not sufficient evidence to show that defendant Long possessed fraudulent intent in directing the issuance of a check from Local Union 101 for the reimbursement to the IUOE. Because fraudulent intent is an essential element for a § 501(c) violation, judgment of acquittal must be granted on Count Nine in favor of defendant Long.

Additionally, judgment of acquittal must be granted in favor of defendant Cantrell on this Count. Defendant Cantrell is charged with aiding and abetting defendant Long in the commission of a § 501(c) violation. While a defendant may be found guilty of aiding and abetting though the principal is acquitted, *Standefer v. United States*, 447 U.S. 10, 20, 100 S.Ct. 1999, 2006 (1980), to be guilty "he must share in the principal's essential criminal intent," *United States v. Lard*, 734 F.2d 1290, 1298 (8th Cir. 1984). As there is insufficient evidence to show that defendant Long possessed the requisite fraudulent intent, defendant Cantrell cannot be found guilty either.

Moreover, there is no evidence that defendant Cantrell knew more than that defendant Long was going to attempt to acquire the funds to reimburse the IUOE. There was no evidence that defendant Cantrell knew the means by which defendant Long would obtain the funds. To be found guilty of aiding and abetting, a defendant must " 'in some sort associate himself with the venture, that he participate in it as something he wishes to bring about, that he seek by his actions to make it succeed." *Lard*, 734 F.2d at 1298 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619, 69 S.Ct. 766, 770 (1949).

As with Count Nine, there is insufficient evidence to support a conviction of either defendant on Count Ten of the indictment. Count Ten charges that the defendants caused the check from the MSBCTC to the IUOE to move across a state line knowing that the check had been stolen, converted or taken by fraud.

The evidence at trial established only that defendant Long sent a check from Local Union 101 to the MSBCTC for the sole purpose of the MSBCTC sending the funds on to the IUOE. This was done so at the direction of defendant Cantrell. Defendant Cantrell knew the purpose of the check from Local Union 101 and accomplished that purpose. That the Local Union 101 check was first deposited in an MSBCTC account does not make those funds the property of the MSBCTC. In fact, had the MSBCTC done anything but reimburse the IUOE with these funds, the MSBCTC itself would have been stealing, converting or taking by fraud those funds.

There was also insufficient evidence to support finding of guilty on the Count Two conspiracy charge.

This Court recognizes that a defendant may be found not guilty of the substantive crimes alleged to be the object of the conspiracy while still being found guilty of the conspiracy to commit those crimes. *United States v. Townsley*, 843 F.2d 1070, 1086 (8th Cir. 1988). This is so because "[t]he commission of a substantive offense and a conspiracy to commit that offense are two separate and distinct crimes." *United States v. Shigemura*, 682 F.2d 699, 705 (8th Cir. 1982).

However, "[t]he essence of a conspiracy is an agreement between two or more persons to commit an illegal

act." *United States v. Peyro*, 786 F.2d 826 (8th Cir. 1986). In the instant case, there simply was no evidence of any such agreement presented at trial.

During the time frame of the conspiracy alleged in Count Two of the indictment, the evidence at trial showed that defendant Long and defendant Cantrell agreed to do but one thing: reimburse the IUOE for the funds it had provided from its grant account. The reimbursement agreement, moreover, was itself very limited. Defendant Cantrell agreed with defendant Long only that if defendant Long sent reimbursement funds to the MSBCTC that defendant Cantrell would then forward those funds on to the IUOE.

Certainly it cannot be said that the reimbursement to the IUOE was an illegal act. Assuming *arguendo* that the *means* by which defendant Long intended to obtain those funds were illegal, there is no evidence from which it can be inferred that defendant Cantrell agreed to or even knew of the means defendant Long would use.

In conclusion, this Court finds that there is insufficient evidence to support the findings of guilty for defendants Long and Cantrell on Counts Two, Nine and Ten of the indictment.

Multiplicity

Defendants argue that the conspiracies alleged in Counts One and Two of the indictment are in fact but one conspiracy. This same argument was made in a pre-trial motion. In ruling on the pre-trial motion, this Court found that the government in the indictment had alleged

facts which support a theory of two separate conspiracies. This Court then suggested that, should the facts placed in evidence merit it, the issue of whether there was a single or multiple conspiracies would be submitted to the jury. *See* Order dated August 3, 1990 (citing *United States v. Zimmerman*, 832 F.2d 454, 457-58 (8th Cir. 1987). Whether a single conspiracy or multiple conspiracies exist is a question for the jury. *Zimmerman*, 832 F.2d at 457.

At the time counsel and this Court held the jury instruction conference in this case, this Court did not understand counsel for defendants to be requesting that this issue be submitted to the jury. Review of the trial transcripts and defendants' offered jury instructions, however, indicate otherwise. Defendants' instructions 17 and 45 request that the jury be instructed on this factual issue. These instructions were offered by defense counsel during the jury instruction conference held at the close of all the evidence. This Court, however, did not give either of the proposed instructions and did not submit this issue to the jury.

As such, there is a reasonable argument to be made that this Court's failure to submit this issue to the jury constitutes sufficient error to merit a new trial. Given that this Court will grant defendants' motion for judgment of acquittal, however, this motion is moot at this time.

Defendants also argue that Count Two of the indictment itself charges two conspiracies: first, a conspiracy to cover up the acts alleged under the Count One conspiracy and, second, a conspiracy to violate 18 U.S.C. § 2314 and 29 U.S.C. § 501(c).

This Court does not agree. A fair reading of the charge under Count Two is that the indictment alleges a cover-up of the first conspiracy by means of actions which violate these statutes.

For these reasons, this Court cannot grant defendants' motion for judgment of acquittal on the basis of multiplicity.

Instructions and Indictment

Defendants next argue that the indictment fails to state an essential element of a 29 U.S.C. § 501(c) violation. As argued above, defendants suggest that lack of union authorization is an essential element of the crime charged in Count Nine. As discussed above, this Court does not agree that lack of authorization is an essential element of a § 501(c) violation. Thus, this element need not be pleaded in the indictment.

Defendants next argue that the government constructively amended the indictment by changing its theory of non-authorization by the executive board of Local Union 101 to non-authorization by various Union officers. This argument must fall for the reason noted above.

Lastly, defendants argue that the indictment alleges, and the jury instructions instruct, that under Counts Two and Nine defendant Long converted money to his own use. While this Court agrees that there was no evidence of such at trial, the indictment and the instructions state that defendant Long converted money "to his own use and the use of others." This is a proper form of alternate allegations.

For these reasons, defendants' motion for judgment of acquittal on these grounds cannot be granted.

Motion for Arrest of Judgment

Pursuant to Fed.R.Crim.P. 34, a court "on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." This Court has reviewed defendants' suggestions in support of their motions and finds nowhere an argument for lack of jurisdiction. This Court of its own search of the record finds that it has jurisdiction over the defendants and that the indictment does charge criminal offenses. For this reason, defendants' motion for arrest of judgment will be denied.

Motion for New Trial

As discussed above, this Court believes that its failure to instruct the jury on the issue of a single conspiracy or multiple conspiracies is sufficient error to merit the grant of a motion for new trial. This Court, however, in granting defendants' motion for judgment of acquittal has rendered this issue moot.

Conclusion

A review of the record in the instant case reveals that there is insufficient evidence to support the jury's verdicts of guilty on Counts Two, Nine and Ten for defendants Long and Cantrell. For this reason, it is therefore

ORDERED that defendants' motion for judgment of acquittal is granted. It is further

ORDERED that defendant Sam F. Long is acquitted of the charges in Counts Two, Nine and Ten of the indictment. It is further

ORDERED that defendant Elmer J. Cantrell is acquitted of the charges in Counts Two, Nine and Ten of the indictment. It is further .

ORDERED that defendants' motion for arrest of judgment is denied. It is further

ORDERED that defendants' motion for new trial is denied as moot.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States
District Judge

December 5 , 1990

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-3063WMKC	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
United States of America,	*	
Appellant,	*	
	*	
vs.	*	
Sam F. Long,	*	
Appellee.	*	
United States of America,	*	
Appellant,	*	
	*	
vs.	*	
Elmer J. Cantrell,	*	
Appellee.	*	

The suggestions for rehearing en banc are denied. Judge McMillian would grant the suggestions for rehearing en banc.

The petitions for rehearing are also denied.

February 21, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SAM F. LONG, DOB: 7/13/28 EDWARD E. QUICK, DOB: 2/16/35 ELMER J. CANTRELL, DOB: 11/28/28 Defendants.	(Filed June 14, 1990) No. 90-00116-01/03-CR-W-5 Count One, All Defendants 18 U.S.C. § 371 [NMT: 5 years and $250,000 fine, plus $50 Special Assessment] Count Two, Cantrell and Long 18 U.S.C. § 371 [NMT: 5 years and $250,000 fine, plus $50 Special Assessment] Counts Three and Five, All Defendants 18 U.S.C. §§ 2315 and 2 [NMT: 10 years and $250,000 fine, plus $50 Special Assessment] Counts Four and Six, All Defendants 18 U.S.C. §§ 2314 and 2 [NMT: 10 years and $250,000 fine, plus $50 Special Assessment] Count Seven, All Defendants 29 U.S.C. § 501(c) and 18 U.S.C. § 2

[NMT: 5 years and
$250,000 fine, plus $50
Special Assessment]

Counts Eight and Nine,
Cantrell and Long
28 U.S.C. § 501(c) and
18 U.S.C. § 2
[NMT: 5 years and
$250,000 fine, plus $50
Special Assessment]

Count Ten, Cantrell and
Long
18 U.S.C. 2314 and 2
[NMT: 10 years and
$250,000 fine, plus $50
Special Assessment]

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

From on or before January, 1985 and continuing to on or after March 24, 1986, the exact dates being unknown to the grand jury, in the Western District of Missouri, and elsewhere, SAM F. LONG, EDWARD E. QUICK, and ELMER J. CANTRELL, defendants herein, did knowingly and willfully conspire, combine, confederate and agree together with each other and with diverse other persons, both known and unknown to the grand jury to commit the following offenses against the United States:

To transport and cause to be transported in interstate commerce checks and drafts of the value of $5,000 or more, knowing the same to have been stolen, converted

or taken by fraud in violation of Title 18, United States Code, Section 2314.

To receive and cause to be received checks and drafts of the value of $5,000 or more, which were moving as, were a part of, and constituted interstate commerce, between the District of Columbia and the State of Missouri, knowing the same to have been unlawfully converted or taken by fraud in violation of Title 18, United States Code, Section 2315.

To cause ELMER J. CANTRELL, president of the Missouri State Building and Construction Trades Council, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, to unlawfully and willfully embezzle, steal, abstract and convert to his own use and the use of others, moneys, funds, property and assets of said labor organization, in violation of Title 29, United States Code, Section 501(c).

From on or about August 1, 1984, through on or about November 31, 1987, the International Union of Operating Engineers, Washington, D.C., was a grant recipient of grant E9F4D183 of Round Two of the New Directions Grant Program, a program monitored by the Occupational Safety and Health Administration of the United States Department of Labor.

At all times pertinent to this indictment, the International Union of Operating Engineers, 1125 Seventeenth Street N.W., Washington, D.C., hereinafter IUOE, was a labor organization engaged in an industry affecting commerce within the meaning of Sections 402(i) and 402(j) of

Title 29, United States Code, and A. Bennett Hill, Jr., was its director of safety and health programs.

At all times pertinent to this indictment, Local Number 101, Hoisting and Portable Engineers AFL-CIO, 6301 Rockhill Road, Kansas City, Missouri, hereinafter Local No. 101, was a labor organization engaged in an industry affecting commerce within the meaning of Sections 402(i) and 402(j) of Title 29, United States Code, and SAM F. LONG was its president and business manager.

At all times pertinent to this indictment, the Missouri State Building and Construction Trades Council, 208 Madison Street, Jefferson City, Missouri, hereinafter MSBCTC, was a labor organization engaged in an industry affecting commerce within the meaning of Sections 402(i) and 402(j) of Title 29, United States Code, and ELMER J. CANTRELL was its president.

It was further a part of the conspiracy that defendant SAM F. LONG would and did approach IUOE officials to secure funding to finance what he represented to be a safety program to be conducted by MSBCTC.

It was further a part of the conspiracy that defendants would and did agree that defendant EDWARD E. QUICK would be denominated as the director of said safety program.

It was further a part of the conspiracy that the defendants would and did cause A. Bennett Hill, Jr., director of health and safety for IUOE to thereafter issue two checks for $5,000 each, dated December 13, 1985 and February 19, 1986, from the IUOE/OSHA Special Grant bank

account, to the Missouri State Building Trades Safety Program.

It was further a part of the conspiracy that defendants ELMER J. CANTRELL and EDWARD E. QUICK would and did on or about December 23, 1985, open a bank account at the Central Trust Bank in the name of Missouri State Building and Construction Trades (Safety Program), the existence of which was not disclosed to the MSBCTC.

It was further a part of the conspiracy that defendants ELMER J. CANTRELL and EDWARD E. QUICK would and did deposit and cause to be deposited to such bank account, the aforedescribed two checks, and that defendants CANTRELL and QUICK would and did issue to one another purporting to be salary, when in truth and fact, no safety program was initiated and no measurable work was done.

In furtherance of this conspiracy and to effect the objects thereof, in the Western District of Missouri and elsewhere, the defendants committed and caused to be committed the following overt acts, among others:

OVERT ACTS

1. On or after December 13, 1985, defendant SAM F. LONG received a $5,000 check drawn on the International Union of Operating Engineers OSHA Grant Special Account, payable to Missouri State Building Trades Safety Program, and thereafter gave the same said check to defendants EDWARD E. QUICK and ELMER J. CANTRELL.

2. On or about December 23, 1985, defendants EDWARD E. QUICK, and ELMER J. CANTRELL opened account number 1-3766-9 in the name of Missouri State Building and Construction Trades (Safety Program) at the Central Trust Bank, Jefferson City, Missouri.

3. On or about December 23, 1985, defendants EDWARD E. QUICK and ELMER J. CANTRELL deposited and caused to be deposited to said account a $5,000 check drawn on the International Union of Operating Engineers OSHA Grant Special Account, and payable to Missouri State Building Trades Safety Program.

4. On or about March 5, 1986, defendants EDWARD E. QUICK and ELMER J. CANTRELL deposited and caused to be deposited to aforesaid account a check in the amount of $5,000 drawn on the International Union of Operating Engineers OSHA Grant Special Account, and payable to Missouri State Building Trades Safety Program.

ISSUANCE OF CHECKS

Defendants ELMER J. CANTRELL and EDWARD E. QUICK together did commit the following additional overt acts consisting of issuing checks on or abut the dates listed below and in the approximate amounts designated, which checks were drawn on account number 1-3766-9 and negotiated:

Overt Act	Date	Check No.	Payee	Amount
5	1/1/86	102	Edward E. Quick	$ 977.70
6	1/1/86	103	Elmer J. Cantrell	540.49
7	1/15/86	104	Edward E. Quick	977.70
8	1/15/86	105	Elmer J. Cantrell	540.44
9	2/1/86	106	Elmer J. Cantrell	540.44
10	2/1/86	107	Edward E. Quick	977.70
11	2/15/86	108	Elmer J. Cantrell	566.67
12	2/15/86	109	Edward E. Quick	1,066.67
13	3/1/86	110	Elmer J. Cantrell	566.67
14	3/1/86	111	Edward E. Quick	1,066.67
15	3/15/86	112	Elmer J. Cantrell	472.47
16	3/15/86	113	Edward E. Quick	1,066.89

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

From on or before June 17, 1986, and continuing or on or after July 24, 1987, the exact dates being unknown to the grand jury, in the Western District of Missouri and elsewhere, SAM F. LONG and ELMER J. CANTRELL, defendants herein, did knowingly and willfully conspire, combine, confederate and agree together with each other and with diverse other persons, both known and unknown to the grand jury, to conceal the conversion of moneys from IUOE and to commit the following offenses against the United States:

To cause SAM F. LONG, president and business manager of Local No. 101, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, to unlawfully and willfully embezzle, steal, abstract and convert to defendants' use and the use of others, moneys, funds, property, and assets of said labor organization, in violation of Title 29, United States Code, Section 501(c).

To transport and cause to be transported in interstate commerce a check or draft of the value of more than $5,000, knowing the same to have been stolen, converted or taken by fraud, in violation of Title 18, United States Code, Section 2314;

From on or about August 1, 1984, through on or about November 31, 1987, the International Union of Operating Engineers, Washington, D.C., was a grant recipient of grant E9F4D183 of Round Two of the New Directions Grant Program, a program monitored by the Occupational Safety and Health Administration of the United States Department of Labor.

At all times pertinent to this indictment, the International Union of Operating Engineers, 1125 Seventeenth Street N.W., Washington, D.C., hereinafter IUOE, was a labor organization engaged in an industry affecting commerce within the meaning of Sections 402(i) and 402(j) of Title 29, United States Code, and A. Bennett Hill, Jr., was its director of safety and health programs.

At all times pertinent to this indictment, Local Number 101, Hoisting and Portable Engineers AFL-CIO, 6301 Rockhill Road, Kansas City, Missouri, hereinafter Local No. 101, was a labor organization engaged in an industry affecting commerce within the meaning of Sections 402(i) and 402(j) of Title 29, United States Code, and SAM F. LONG was its president and business manager.

At all times pertinent to this indictment, the Missouri State Building and Construction Trades Council, 208 Madison Street, Jefferson City, Missouri, hereinafter MSBCTC, was a labor organization engaged in an industry affecting commerce within the meaning of Sections 402(i) and 402(j) of Title 29, United States Code, and ELMER J. CANTRELL was its president.

Preceding the instant conspiracy but pertinent thereto, these defendants and another caused A. Bennett Hill, Jr., director of health and safety for IUOE to issue two checks for $5,000 each, dated December 13, 1985, and February 19, 1986, from the IUOE OSHA Special Grant bank account, to the Missouri State Building Trades Safety Program.

Also preceding the instant conspiracy but pertinent thereto, defendant ELMER J. CANTRELL and another, on or about December 23, 1985, did open a bank account into

which said checks were deposited, the existence of which was undisclosed to various persons and entities. Thereafter, defendant ELMER J. CANTRELL and another did issue checks to one another purporting to be salary, when in truth and fact, no safety program was initiated and no measurable work was done.

It was a part of the instant conspiracy that following an OSHA review of IUOE grant E9F4D183, that defendants ELMER J. CANTRELL and SAM F. LONG, in order to conceal and prevent detection of fraud and embezzlement, agreed to obtain $10,000 to reimburse the IUOE OSHA Special Grant account through the following manner and means:

It was a part of the conspiracy that defendant SAM F. LONG would and did, without the knowledge or approval of the Local No. 101 executive board, arrange for and sell assets of Local No. 101 for the total sum of $10,000, which sum he thereafter deposited and caused to be deposited to Local No. 101 bank account on or about July 16, 1987.

It was further a part of the conspiracy that defendant SAM F. LONG, on or about July 21, 1987, would and did, without the knowledge or approval of the Local No. 101 executive board, issue and caused to be issued a check for $10,000 from Local No. 101 and payable to the Missouri State Building Trades Safety Program.

It was further a part of the conspiracy that defendant ELMER J. CANTRELL, on or about July 24, 1987, would and did issue and caused to be issued to IUOE/OSHA, a check for $10,000 drawn on the Missouri State Building and Construction Trades Council bank account.

In furtherance of this conspiracy, and to effect the objects thereof, in the Western District of Missouri and elsewhere, the defendants committed and caused to be committed the following overt acts, among others:

OVERT ACTS

1. On or about May 26, 1987, defendant SAM F. LONG received a letter and a check for $6,200 payable to Local Union No. 101-IUOE, from Ernest B. Jorgensen, Jr., President of Professional Safety Consultants Co., Inc., "to cover the cost of materials relating to the derrick collapse".

2. On or about May 28, 1987, defendant SAM F. LONG sent a letter to Mr. Ben Hill, Director of Safety, International Union of Operating Engineers, advising him that he would receive a check from the Missouri State Building Trades in the amount of $10,000 within the next thirty days.

3. On or about July 13, 1987, defendant SAM F. LONG received a letter and a check for $3,800 payable to Local Union 101-IUOE, from Ernest B. Jorgensen, Jr., President of Professional Safety Consultants Co., Inc., "to cover the cost of the materials relating to the Hyatt Regency disaster".

4. On or about July 16, 1987, defendant SAM F. LONG deposited the aforedescribed checks in the amounts of $6,200 and $3,800 in Local No. 101 bank account.

5. On or about July 21, 1987, defendant SAM F. LONG issued a check in the amount of $10,000 drawn on

Local No. 101 bank account, and payable to Missouri State Building Trades Safety Program.

6. On or about July 24, 1987, defendant ELMER J. CANTRELL issued a check in the amount of $10,000, drawn on Missouri State Building and Construction Trades Council bank account, and payable to IUOE/ OSHA.

All in violation of Title 18, United States Code, Section 371.

COUNT THREE

On or about the 13th day of December 1985, in the Western District of Missouri, defendants SAM F. LONG, EDWARD E. QUICK and ELMER J. CANTRELL did receive a security, unlawfully converted and taken by fraud, that is, a check numbered 1691 in the amount of $5,000 drawn on the International Union of Operating Engineers OSHA Grant Special Account, payable to the Missouri State Building Trades Safety Program, which check was moving as, was a part of, and constituted interstate commerce from the District of Columbia to the State of Missouri, knowing the same to have been unlawfully converted and taken by fraud.

All in violation of Title 18, United States Code, Sections 2315 and 2.

COUNT FOUR

Between on or about December 23, 1985, and on or about December 26, 1985, in the Western District of Missouri, defendants SAM F. LONG, EDWARD E. QUICK

and ELMER J. CANTRELL, unlawfully caused to be transported in interstate commerce from Jefferson City, State of Missouri, in the Western District of Missouri, to the District of Columbia, a security, stolen, converted and taken by fraud, that is, a check numbered 1691, in the amount of $5,000 drawn on the International Union of Operating Engineers OSHA Grant Special Account, payable to the Missouri State Building Trades Safety Program, knowing the same to have been stolen, converted, and taken by fraud.

All in violation of Title 18, United States Code, Sections 2314 and 2.

COUNT FIVE

On or about the 19th day of February, 1986, in the Western District of Missouri, defendants SAM F. LONG, EDWARD E. QUICK and ELMER J. CANTRELL did receive a security, unlawfully converted and taken by fraud, that is, a check numbered 1736 in the amount of $5,000 drawn on the International Union of Operating Engineers OSHA Grant Special Account, payable to the Missouri State Building Trades Safety Program, which check was moving as, was a part of, and constituted interstate commerce from the District of Columbia to the State of Missouri, knowing the same to have been unlawfully converted and taken by fraud.

All in violation of Title 18, United States Code, Sections 2315 and 2.

COUNT SIX

Between on or about March 5, 1986, and on or about March 7, 1986, in the Western District of Missouri, defendants SAM F. LONG, EDWARD E. QUICK and ELMER J. CANTRELL, unlawfully caused to be transported in interstate commerce from Jefferson City, State of Missouri, in the Western District of Missouri, to the District of Columbia, a security, stolen, converted and taken by fraud, that is, a check numbered 1736, in the amount of $5,000 drawn on the International Union of Operating Engineers OSHA Grant Special Account, payable to the Missouri State Building Trades Safety Program, knowing the same to have been stolen, converted, and taken by fraud.

All in violation of Title 18, United States Code, Sections 2314 and 2.

COUNT SEVEN

Between on or about the 13th day of December, 1985 and 24th day of March, 1986, in the Western District of Missouri, defendant ELMER J. CANTRELL, while an officer, that is, president of the Missouri State Building and Construction Trades Council, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, did embezzle, steal, and unlawfully and willfully abstract and convert to his own use and the use of another, the sum of approximately $9,360.51 of the moneys and funds of such labor organization, and defendants EDWARD E.

QUICK and SAM F. LONG did aid, abet, counsel, command, induce and procure the commission of said offense.

All in violation of Title 29, United States Code, Section 501(c) and Title 18, United States Code, Section 2.

COUNT EIGHT

Between on or about May 18, 1987 and on or after July 16, 1987, in the Western District of Missouri, defendant SAM F. LONG, while an officer, that is, president and business manager of Local Number 101, Hoisting and Portable Engineers AFL-CIO, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, did embezzle, steal, and unlawfully and willfully abstract and convert to his own use and the use of others, assets including display boards and carrying case of the value of approximately $1,836.63, of said labor organization, and defendant ELMER J. CANTRELL did aid, abet, counsel, command, induce and procure the commission of said offense.

All in violation of Title 29, United States Code, Section 501(c) and Title 18, United States Code, Section 2.

COUNT NINE

On or about the 21st day of July, 1987, in the Western District of Missouri, defendants SAM F. LONG, while an officer, that is, president and business manager of Local Number 101, Hoisting and Portable Engineers AFL-CIO, a labor organization engaged in an industry affecting

commerce, as defined be Sections 402(i) and 402(j), Title 29, United States Code, did embezzle, steal, and unlawfully and willfully abstract and convert to his own use and the use of others, the sum of $10,000 of the moneys and funds of such labor organization, and defendant ELMER J. CANTRELL did aid, abet, counsel, command, induce and procure the commission of said offense.

All in violation of Title 29, United States Code, Section 501(c) and Title 18, United States Code, Section 2.

COUNT TEN

On or about the 24th day of July, 1987, in the Western District of Missouri, defendant ELMER J. CANTRELL did unlawfully transport and cause to be transported in interstate commerce from Jefferson City, State of Missouri, in the Western District of Missouri, to the District of Columbia, a security, that is, a check numbered 3842, in the amount of $10,000, drawn on the account of Missouri State Building and Construction Trades Council and payable to IUOE/OSHA, knowing that said check contained at least $5,000 of funds that had been stolen, converted and taken by fraud, and defendant SAM F. LONG did aid, abet, counsel, command, induce and procure the commission of said offense.

All in violation of Title 18, United States Code, Section 2314 and 2.

A TRUE BILL

/s/ Christine L. Crochett
FOREPERSON OF THE
GRAND JURY

/s/ Sheryle L. Jeans
SHERYLE L. JEANS, #21995
Assistant United States Attorney
Organized Crime Strike Force Unit

Supreme Court, U.S.
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(2)

No. 91-1876

In the Supreme Court of the United States

OCTOBER TERM, 1991

SAM F. LONG AND ELMER J. CANTRELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1876

SAM F. LONG AND ELMER J. CANTRELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order granting a motion for a judgment of acquittal following a jury verdict of guilty.

1. On June 14, 1990, petitioners were indicted by a grand jury sitting in the Western District of Missouri. Three counts of the ten-count indictment charged them with conspiracy to embezzle money from a union, in violation of 18 U.S.C. 371; embezzling money from a union, in violation of 29 U.S.C. 501(c); and unlawfully transporting stolen money, in violation of 18 U.S.C. 2314. Following a jury trial, petitioners were convicted on those three counts and acquitted on the other seven counts.

On December 5, 1990, the district court granted a post-verdict judgment of acquittal on the ground that there was insufficient evidence to convict. The district court also concluded that its failure to instruct the jury about single or multiple conspiracies warranted a new trial, but that a new trial ruling was mooted by the court's grant of the acquittal. Pet. App. 31-49.

On December 12, 1991, the court of appeals reversed. Pet. App. 1-30. The court held that the evidence was sufficient to convict petitioners on all three counts. The court also ruled that the district court erred in concluding that the failure to instruct on the issue of single versus multiple conspiracies merited a new trial.

2. Petitioners contend (Pet. 14-29) that the evidence was insufficient to establish the offense of union embezzlement, in violation of 29 U.S.C. 501(c), because the evidence failed to show that Long had fraudulent intent or that he lacked proper union authorization, and because the evidence failed to show that Cantrell was guilty of aiding and abetting Long. Petitioners also contend (Pet. 9-14) that lack of authorization for use of the money under the union's constitution and by-laws is an essential element to prove a violation of 29 U.S.C. 501(c), especially where, as here, it is alleged in the indictment.

Whatever the merits of petitioners' contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioners in the same position they would have occupied if the district court had denied their post-trial motions for a judgment of acquittal and for a new trial. If the district court sentences petitioners but the court of appeals reverses petitioners' convictions on appeal from the final judgment against them, petitioners' present

claims might be mooted. If, on the other hand, the court of appeals affirms their convictions, petitioners will then be able to present their current contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of the final judgment. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

JUNE 1992

* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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No. 91-1876

In The

Supreme Court of the United States

October Term, 1992

SAM F. LONG AND ELMER J. CANTRELL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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No. 91-1876

In The

Supreme Court of the United States

October Term, 1992

SAM F. LONG AND ELMER J. CANTRELL,

Petitioners,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

After a jury verdict of guilty on three (3) counts and not guilty on seven (7) counts, the district court for the Western District of Missouri granted a post-verdict judgment of acquittal on the ground that there was insufficient evidence to convict. The district court also held that a new trial was warranted, but moot in light of the acquittal, because it failed to instruct the jury about single or multiple conspiracies. Following the Government's direct appeal, the Court of Appeals reversed and reinstated the jury verdict, holding that there was sufficient evidence to convict and that a new trial was not warranted.

The Government argues that Petitioners' contentions are not ripe for review by this Court because the Court of

Appeals' reinstatement of the jury verdict puts Petitioners in the same position as when they were originally convicted. Thus, the Government's argument goes, Petitioners cannot directly appeal that final judgment until after sentencing by the district court. At such time, the Government contends Petitioners will be able to raise their current contentions. Further, in a footnote, the Government refers to this Petition as interlocutory and thus did not respond on the merits. The Government cites no case law for any of its contentions.

While the Government argues that this case is interlocutory, Petitioners disagree. Petitioners merely seek review of the Court of Appeals' decision overruling the district court's entry of a judgment of acquittal. Clearly, entry of a judgment of acquittal constitutes a final judgment. *United States v. Martinez*, 763 F.2d 1297, 1311 (11th Cir. 1985). Thus, the Petition is appropriate at this stage.

If considered interlocutory, the Court of Appeals' reinstatement of the jury verdict can be appealed only under certain circumstances which do not exist in this case.[1] If review on this Petition for Writ of Certiorari is not granted, Petitioners are concerned that the Government is likely to later assert collateral estoppel to prevent any appeal to the Eighth Circuit and, if necessary, any Petition for Writ of Certiorari to this court, following their sentencing. The Petitioners expect that the Government would assert collateral estoppel on the basis that

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[1] For example, the collateral order exception is not met here because sufficiency of the evidence is not an issue completely separate from the merits of the action. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-7 (1949); *Sedlock by Sedlock v. Bic Corp.*, 926 F.2d 757, 758 (8th Cir. 1991).

the Court of Appeals has already ruled there was sufficient evidence to convict and there was no error in the district court's failure to instruct on one versus two conspiracies.

The elements of collateral estoppel are:

(1) The issue sought to be precluded must be the same as that involved in the prior action;

(2) The issue must have been litigated in the prior action;

(3) The issue must have been determined by a valid and final judgment; and

(4) The determination must have been essential to the prior judgment.

In re Miera, 926 F.2d 741, 743 (8th Cir. 1991). The Petitioners expect that the Government would attempt to demonstrate that the elements of collateral estoppel would be met as a result of the existing decision by the Court of Appeals that has already addressed the sufficiency of the evidence and conspiracy instruction issues. Thus, Petitioners believe the Government is setting up a "catch-22" situation by arguing that this is an interlocutory petition at this stage and positioning to argue the finality of the existing Court of Appeals' decision and collateral estoppel later. If this Court accepts the Government's argument, Petitioners will be in a no-win situation.

In response to this predicament, this Court should overrule the Government's argument that the Petition is interlocutory and grant review. Alternatively, this Court should make clear that the doctrine of collateral estoppel

should not be applied, if review is not granted by this Court and, if the Government later asserts that doctrine.

In *Pinkney v. Keane*, 920 F.2d 1090, 1096 (2d Cir. 1990), the Second Circuit noted that "failure to appeal an adverse judgment negates the preclusive effect of that judgment only when review was unobtainable 'as a matter of law.' " In other words, collateral estoppel does not preclude relitigation of an issue when the prior judgment was unreviewable as a matter of law. In footnote nine, the court in *Pinkney* further noted that unreviewable as a matter of law includes a situation in which " 'the law does not allow review of the particular category of judgments.' " *Pinkney*, 920 F.2d at 1096 (quoting *Restatement (Second) of Judgments* § 28(1) cmt. a (1992)).

Interlocutory judgments are in a category of judgments where review is not granted as a matter of law. Thus, in the present case, if this Court rejects the Petition because it is interlocutory, it should also determine that review is unobtainable as a matter of law. Accordingly, should the Court deny the Petition, collateral estoppel should not be applied to the present case to preclude litigation of the sufficiency of the evidence and conspiracy instruction issues on direct appeal to the Eighth Circuit or, if necessary, on any subsequent Petition for Writ of Certiorari after sentencing.

Fairness should also be a consideration in determining applicability of collateral estoppel. *See In re Miera*, 926 F.2d 741, 743 (8th Cir. 1991) (collateral estoppel is only applied against those with full and *fair* opportunity to litigate in a prior adjudication); *Frye v. United Steelworkers of America*, 767 F.2d 1216, 1221 (7th Cir. 1985), *cert. denied*,

474 U.S. 1007 (1985) ("considerations of fairness can make application of collateral estoppel inappropriate for a number of reasons"). Petitioners contend that unfairness would result if review of the sufficiency of the evidence and new trial issues is precluded altogether.

Petitioners contend that this Court should overrule the Government's argument that the Petition is interlocutory. Alternatively, should this Court determine this Petition is interlocutory, it should deny the Petition on that basis and so state. Petitioners respectfully request that this Court note that collateral estoppel does not preclude raising these issues on appeal and/or a later petition for writ of certiorari after sentencing, if it denies this Petition for Writ of Certiorari.

WHEREFORE, for the foregoing reasons and those stated in their Petition, Petitioners respectfully pray this Court grant their Petition for Writ of Certiorari or, in the alternative, indicate the reason for denial of certiorari and state that Petitioners are not collaterally estopped from raising these issues on appeal after sentencing, and for any other relief this Court deems just and proper.

Respectfully submitted,

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